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BRIEF OF APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED AUG 14 1956
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Docket No. 13,340

PAUL DAYTON,

Appellant

against

WHITNEY GILLILLAND, PEARL CARTER PACE AND HENRY J. CLAY, constituting the Foreign Claims Settlement Commission of the United States, and GEORGE M. HUMPHREY as Secretary of the Treasury of the United States of America,

Appellees

APPEAL FROM AN ORDER OF THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. Whether the District Court abused its discretion under Rule 15(a) of the Federal Rules of Civil Procedure in refusing to allow appellant to amend his amended complaint to more definitely state the jurisdiction of the court and to specify the constitutional rights denied by the decision of the Foreign Claims Settlement Commission, when the amendment did not prejudice any party to the suit.

2. Whether the District Court had jurisdiction over the subject matter of the suit to declare the decision of the Foreign Claims Settlement Commission null and void in that the decision was contrary to the provisions of the International Claims Settlement Act, as amended, and denied appellant his property rights in the Yugoslav Claims Fund without due process of law in violation of the Fifth Amendment to the Constitution, notwithstanding that Section 4(h) of said Act declares that all actions of the Commission are "* * * final and conclusive on all questions of law and fact and not subject to review * * * by any court by mandamus or otherwise."

3. Whether the District Court had jurisdiction to declare Section 4(h) of the International Claims Settlement Act, as amended, unconstitutional.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12791

PAUL DAYTON,

APPELLANT

v.

WHITNEY GILLILLAND, PEARL CARTER PACE AND HENRY J. CLAY, constituting the Foreign Claims Settlement Commission of the United States, and GEORGE M. HUMPHREY as Secretary of the Treasury of the United States of America,

APPELLEES.

Appeal from an order of the District Court for the District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is based on the Act of June 25, 1948, c. 646, 62 Stat. 929; 28 USC, Sec. 1291. Notice of appeal was filed May 7, 1956.

STATEMENT OF THE CASE

Pursuant to the agreement of July 19, 1948 between the United States and Yugoslavia, (App. C, pp. 44a - 51a; hereinafter referred to as the "Agreement") the Government of Yugoslavia paid into the United States Treasury the sum of $17,000,000, not to the United States Government as such, but to be distributed by the United States as Trustee to those United States nationals

whose property has been nationalized or otherwise taken by Yugoslavia. If after adjudication of all claims any balance remained, that balance was to be returned to Yugoslavia. All costs of adjudicating the claims was to be charged against the Fund.

To implement this agreement Congress enacted the International Claims Settlement Act of 1949 (64 Stat. 13-17) (App. B, pp. 31a-43a; hereinafter referred to as the "Act"). Under this Act the International Claims Commission was established to receive, examine, adjudicate and render final decisions with respect to claims filed pursuant to the Act, in accordance with the terms of the Yugoslav Claims Agreement and the rules of international law, justice and equity.

Appellant, a former citizen of Czechoslovakia, filed a claim with the Commission on or about June 28, 1951. He proved that he became a United States citizen on July 25, 1946, that he had had property in Yugoslavia, and that this property was subject to nationalization under the Nationalization Law of December 6, 1946. The Yugoslav Government opposed appellant's claim and stated that his property was taken before he became a United States national, pursuant to a judgment rendered in absentia by the Military Court of Maribor, Yugoslavia, No. 965/45. The Yugoslav Government did not produce the judgment and the only evidence presented to the Commission to verify the existence of this alleged judgment was a certificate of a notation taken from the files of another Yugoslav military court, the Military Court of Ljubljana.

Appellant contested the existence of this judgment as well as jurisdiction of the court, contended that the certificate was a fabrication, and established the alteration of other documents forwarded to the Commission by the Yugoslav

Government with respect to his case. The Commission refused to insist that the Yugoslav Government produce judgment No. 965/45 for scrutiny or disregard the certificate in examining appellant's claim, and relied exclusively on the statement by the Yugoslav Government of the existence of this alleged judgment, rendered by a court which was patently without jurisdiction over appellant, to deny his claim.

Further, the Commission in its Proposed Decision (App. D, pp. 52a) changed the very content of the certificate by adding thereto that the purported judgment had been issued "under the Yugoslav Enemy Property Law of November 21, 1944 (Official Gazette No. 2, February 6, 1945)", thus making it appear that the Yugoslav judgment referred to in the certificate was proper on its face. However, the certificate as quoted in full in the transcript of the record of the hearing before the Commission on November 23, 1954, did not state pursuant to what Yugoslav law the alleged judgment was issued. Further investigation by appellant showed that it was issued pursuant to the Executive Order Concerning Military Courts of May 22, 1944, Sections 13 and 14 -- a fact confirmed by the Yugoslav Government in a letter from its Consulate General in New York to appellant.

The Commission in denying appellant's claim also used different standards in almost identical cases. In the case of Aladar Sege, Docket 1467, Decision 1546, the Commission decided in favor of claimant Sege, even though he, as allegedly was appellant, was convicted and his property declared confiscated, prior to his becoming a United States citizen.

Thereafter, appellant filed a complaint, amended complaint and proposed amendment to the amended complaint in the United States District

Court for the District of Columbia against the members of the Foreign Claims Settlement Commission* (hereinafter referred to as the "Commission"), and the Secretary of the Treasury of the United States Treasury seeking:

1. A judgment finding and declaring that Final Decision of the Commission (Decision 1371), in Claim No. Y-1117 (hereinafter referred to as the "appellant's claim"), to be contrary to the facts and to the law and null and void.

2. A mandatory injunction requiring the Commission to declare the same as ineffective, to decide appellant's claim in accordance with the facts and the provisions of the Act in accordance with such decision to the Secretary of the Treasury of the United States in accordance with the provisions of Section 5 of the Act.

3. A judgment declaring Section 4(h) of the Act unconstitutional.

4. An injunction restraining the appellee, George M. Humphrey, the Secretary of the Treasury of the United States, until final disposition of the appellant's claim by the Commission in accordance with the provision of the Act, from making payments out of the Yugoslav Claims Fund which would reduce the total amount in such Fund to a sum less than $1,504,624.78, in addition to such other sums as may heretofore have been set aside pending the adjudication of other claims for judicial relief.

5. For such other and further relief as to the Court may seem just and proper.

The appellees answered and demanded judgment. Thereafter, the appellees on April 5, 1956 moved to dismiss the complaint on the ground that the

* All functions of this Commission have been transferred to the Foreign Claims Settlement Commission. See Reorganization Plan No. 1 of 1954 effective July 1, 1954 (19 F.R. 3985).

Court did not have jurisdiction of the subject matter of this action since the decisions of the Commission are final and conclusive. In light of the decision of this Court in de Vegvar v. Gillilland, ____ App. D. C. ____, 228 F. 2d 640, cert. denied March 26, 1956, 24 L. W. 3252, appellant moved at the hearing on the motion to dismiss to amend his complaint to set forth the constitutional issues lacking in the de Vegvar case. The order of May 2, 1956 in the Court below granted the appellees' motion to dismiss the complaint on the ground that the Court lacked jurisdiction of the subject matter of this action, and denied appellant's motion to amend without stating any reason.

The appellant noted an appeal from the judgment of the District Court on May 7, 1956 and on May 8, 1956 filed with this Court a motion for temporary restraining order requesting that the appellee, the Secretary of the Treasury, be temporarily enjoined, pending appeal, from making payments out of the Yugoslav Claims Fund which would reduce the total amount in such Fund to a sum less than $1,504,624.78. By order dated May 14, 1956, this Court denied that motion; Judge Wilbur K. Miller dissented and moved that the motion be reheard by this Court sitting en banc. Appellant was notified on May 24, 1956 that a majority of this Court was not in favor of such a rehearing.

Applicable Statutory Provisions

A. The text of the International Claims Settlement Act of 1949, and the Agreement between the United States and Yugoslavia of July 19, 1948, are set out in full as Appendices B and C hereto.

B. Rule 15(a):

> "Rule 15. Amended and Supplemental Pleadings. (a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served

> or if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading; whichever period may be the longer, unless the court otherwise orders."

Statement of Points

1. The Court erred in denying appellant's motion to amend the amended complaint herein.

2. The Court erred in granting the appellees' motion to dismiss amended complaint herein.

3. The Court erred in holding that it lacked jurisdiction of the subject matter of this action.

Summary of Argument

I

Appellant at the hearing on the motion to dismiss, moved to amend his amended complaint to more definitely state his property right in the Yugoslav Claims Fund and the deprivation of that right by the actions of the Foreign Claims Settlement Commission. This amendment in no way prejudiced the rights of the appellees. The Court, within seconds after its submission, summarily denied the motion to amend without stating any reason therefor. This arbitrary action by the Court was an abuse of its discretion under Rule 15(a) of the Federal Rules of Civil Procedure.

II

The appellant has a property right in the Yugoslav Claims Fund.

Appellant had property in Yugoslavia which was taken by the Government of Yugoslavia. By agreement with the United States, this property, like that of other claimants covered by the Agreement, was converted into United States currency and deposited by the Government of Yugoslavia in the United States Treasury for distribution by the United States as trustee among all of the claimants.

In the implementing Act the Congress directed the Commission to apply the "principles of international law, justice and equity." A fundamental principle of international law and of our national law is that where a foreign judgment is sought to be enforced in a United States tribunal, and the defendant attacks the judgment for lack of jurisdiction of the court rendering the judgment or for other irregularities, said judgment must be carefully scrutinized to determine whether the court rendering the judgment had jurisdiction over the defendant, whether the defendant was summoned, and whether or not there were any other irregularities surrounding the issuance of the judgment.

The proposed amendment to the amended complaint specifies with particularity that in denying appellant's claim, the Commission relied on a mere certificate issued by the Yugoslav Government alleging the existence of a judgment and not on the judgment itself, refused to obtain and scrutinize the judgment referred to in the certificate, and altered the certificate in an effort to give it the appearance of regularity. Although a judgment might be given force and effect, a mere certificate of notation cannot be.

These actions by the Commission were not mere errors in reaching a result, but were violations of all concepts of due process and constituted a denial of appellant's property right in the Yugoslav Claims Fund in violation

of the Fifth Amendment.

The primary purpose of the Agreement was to compensate United States nationals who had lost their property in Yugoslavia through nationalization. However, to prevent Yugoslavia from disguising a taking by nationalization by giving such a taking another label, the catch-all term "other taking" was included in the Agreement. The Congress recognized the basic purpose of the Agreement in the implementing legislation, and directed the Commission to give a liberal interpretation to the term "other taking" so as to permit as many claimants as possible to participate in the distribution of the Fund. Although appellant established that his property had been nationalized, the Commission, contrary to the intent of the Congress, used an acknowledged illegal so-called "other taking" to deny appellant's claim that his property was taken by nationalization. This action by the Commission was in excess of its power under the Act and contrary to the intention of Congress; and deprived appellant of his property right in the Yugoslav Claims Fund without due process of law in violation of the Fifth Amendment.

The Commission in denying appellant's claim applied standards which differed from those used in identical cases. This arbitrary and capricious action by the Commission deprived appellant of his property right in the Yugoslav Claims Fund without due process of law in violation of the Fifth Amendment.

III

As previously stated, appellant has a property right in the Yugoslav Claims Fund. In the Act, Congress provided that "/T/he action of the Commission in allowing or denying any claim under this Act shall be final and conclusive on all questions of law and fact and not subject to review. . . by any

court by mandamus or otherwise." Congress is without power to foreclose judicial review of the actions of an administrative body which deny property rights without due process of law in violation of the Fifth Amendment.

IV

The case of de Vegvar v. Gillilland (1955) supra, is not controlling of the issues in this case. In that case, there was no claim:

1. That the appellant had a property right in the Yugoslav Claims Fund, as noted in II, supra.

2. That the Commission committed certain unauthorized acts which deprived the appellant of her property right in the Yugoslav Claims Fund, as noted in II, supra.

3. That Sec. 4(h) of the Act is unconstitutional, as noted in III, supra.

Argument for Appellant

Point I. The District Court Abused its Discretion Under Rule 15(a) of the Federal Rules of Civil Procedure in Refusing to Allow Appellant to Amend his Amended Complaint.

Prior to the hearing of oral argument before the District Court on appellees' motion to dismiss appellant's complaint, appellant moved for leave of court to amend his amended complaint (the previous amendment being one of right) to more definitely state his cause of action and the jurisdiction of the court. Appellant informed the court that the amendment would in no way prejudice the appellees, that it did not add or subtract any parties, and of the purpose of the amendment. (App. A, p. 27a) Appellees admitted that they were familiar with the content of the amendment, were of the opinion that it would do no good,

and objected on the sole ground that the timing of the proposed amendment was "highly irregular." (App. A, p. 28a). They further suggested that the appellant be required to wait until after the court ruled on the motion to dismiss before offering the motion to amend, and the court so ruled. (App. A, p. 28a.)

At the conclusion of extended argument by both counsel, the court granted appellees motion to dismiss, and appellant renewed his efforts to amend his pleadings as noted above. Although the court accepted the motion and the pleadings for examination, appellant was not permitted to explain wherein the amended complaint would be amended, and the court, after only a matter of seconds had elapsed, denied appellant's motion without stating any reason for its action. (App. A, p. 30a). Appellant contends that this action by the court was error and an abuse of the discretionary powers granted under Rule 15(a) of the Federal Rules of Civil Procedure.

Under Rule 15(a), once responsive pleadings have been served, a plaintiff may only amend his pleadings by leave of court. This court stated in Sheridan-Wyoming Coal Co., Inc. v. Krug (1949) 84 App. D. C. 288, 290, 172 F. 2d 282, 284, (reversed on other grounds, 338 U.S. 621), that:

> ". . . It is elementary that a trial court has wide discretion in respect to amendments which are not of right. . . ."

However, Rule 15(a) goes on to limit this discretionary power by directing that "leave shall be freely given when justice so requires." In Copeland Motors v. General Motors Corp. (1952, 5th Cir.) 199 F. 2d 566, 567-8, the court clearly stated that the purpose of this direction by the rule makers was:

> ". . . to give effect to the principle that cases should, as far as possible, be determined on their merits and not technicalities."

This court enunciated its adherence to that principle in Christensson v. Hogdal

(1952) 91 App. D.C. 251, 254, 199 F. 2d 402, 405:

> ". . . The modern rule is liberal in permitting the amendment of pleadings to show that the court has jurisdiction. . . ."

and, in Rosen v. Rex Amusement Co. (1952, D.C.) 14 F.R.D. 75, the District Court indicated the understanding of the courts of this judicial circuit that Rule 15(a) should be liberally construed:

> ". . . Under the Federal Rules of Civil Procedure considerably more liberality should be permitted with respect to amendments than was formerly the practice. A mere change in the theory upon which the plaintiff seeks to obtain relief would not ordinarily preclude an amendment, nor would the allegation of facts showing more clearly that the plaintiff is entitled to the relief sought. . . . (underscoring supplied)."

The amendment proposed herein by appellant was intended to allege facts showing more clearly that the court had jurisdiction of the subject matter, and that appellant is entitled to the relief sought. However, the District Court summarily denied appellant's motion without hearing oral argument thereon or stating any reasons for the denial of the motion.

From the very brief discussion of the motion, the only reason offered by appellees for opposing the motion was that its timing was "highly irregular." In Lloyd v. United Liquors Corp. (1953, 6th Cir.) 203 F. 2d 789, the trial court had ruled that the amendment was not seasonably offered. The appellate court reversed this decision and stated:

> "In our judgment, the Court should have allowed appellant to file the amendments to his complaint, proposed by his attorney after the argument of the motions to dismiss and for summary judgments, even though appellant's attorney had not complied with the request of the Court that any amendment to the complaint should be presented before the argument. . . (p. 791)

> "Rule 15(a), Federal Rules of Civil Procedure, provides that leave to file amendments to pleadings 'shall be freely given when justice so requires.' Rule 15(b) further evinces the purpose of the rule makers to have been that material amendments shall be freely allowed to accomplish the presentation of an action on its merits." (p. 793)

Furthermore, as was pointed out in Hirshhorn v. Mine Safety Appliance Co., (1951, W.D. Pa.) 101 F. Supp. 549, 552-3, Rule 15(a) does not prescribe any limitation on the time within which an amendment may be offered:

> ". . . (N)o time is prescribed in Rule 15a for amendments by leave of court so that the question of timeliness of the motion to amend and laches of the moving party are merely elements to be considered by the court in the exercise of its discretion. See 1 Barron & Holtzoff, Federal Practice and Procedure Sec. 446 (Rules Ed. 1950). . ."

In Fli-Fab, Inc. v. United States (1954, R.I.) 16 F.R.D. 553, the court pointed out that a failure to timely make a motion to amend alone is not a sufficient reason to deny the motion:

> ". . . Delay, inexcusable or excusable, is not alone sufficient to warrant denial of leave to amend. There must also be a showing that as a result thereof the rights of the plaintiff would be prejudiced if the amendment were allowed."

The question of timeliness is merely an element to be considered in determining whether or not the granting of the motion will prejudice any of the parties. This was clearly pointed out in Carroll v. Pittsburgh Steel Co. (1952, W.D. Pa.) 103 F. Supp. 788:

> "(T)he primary question for the Court to consider in the exercise of the discretion vested in it is whether the allowance of the amendment will work injustice upon any of the parties. In resolving this question, timeliness of the motion is one of the elements which should be considered. . ."

In summary, although Rule 15(a) grants trial courts broad discretion in the granting or denial of motions to amend complaints, amendments to allege

facts showing more clearly that the plaintiff is entitled to relief or establishing the jurisdiction of the court must be allowed, unless they will prejudice the rights of any of the parties to the cause of action. Appellant offered such an amendment and stated that it would not prejudice any of the parties to this cause of action. Appellees did not controvert appellant's statement, but claimed that the timing of the amendment offered was "highly irregular". It has been shown that the timing of an amendment is an element to be considered by the court in determining whether or not the parties will be prejudiced, and is not in and of itself a sufficient reason to deny a proposed amendment. It has further been shown that the court, without permitting appellant to explain his amendment, gave the pleadings a cursory examination and summarily denied the motion to amend. This action by the court was an abuse of its discretion under Rule 15(a) and the decision of the court denying appellant's motion to amend should be reversed and the case should be remanded to permit the presentation of oral argument on the motion to amend.

Point II. The District Court has jurisdiction of the subject matter of this action.

A. Section 4(h) of the Act does not bar certain judicial actions.

In the case of de Vegvar v. Gilliland, supra, this Court held (p. 642):

> "No doubt the provisions of Section 4(h) do not bar certain types of judicial action. . . We may assume for purposes of argument that the provisions of Section 4(h) would probably not prevent judicial relief in the situation -- to illustrate -- where a claimant is denied consideration by reason of his race, creed or color. No violation of constitutional right is suggested here: plaintiff-appellant makes no contention, for example, that the United States has taken her property without paying for it."

The complaint in this action does not seek judicial review of the

decision of the Commission denying appellant's claim. Appellant seeks the aid of the courts to prevent appellees from depriving him of his property right in the Yugoslav Claims Fund without due process of law, through the issuance of an invalid and unlawful final decision of the Foreign Claims Settlement Commission. The gist of the complaint is that the acts of the members of the Commission were unlawful acts done under color of their office and will result in irreparable injury to appellant.

It is our contention that since appellant has a property right in the Yugoslav Claims Fund and was deprived of this property by the Commission without due process of law, the courts have jurisdiction to determine whether the Commission has the power to decide a claim in any manner it chooses, or must comply with the Act creating the Commission and the constitutional requirements of due process of law.

1. The Yugoslav Claims Fund is a trust fund in which the appellant has a property right.

(a) The legislative history of the Yugoslav Claims Fund shows that it is a trust fund.

On July 18, 1948, the United States and Yugoslavia executed an agreement whereby the Secretary of the Treasury unblocked certain Yugoslav assets in the United States, and the Government of Yugoslavia on August 21, 1948, paid into the United States Treasury $17,000,000 in full settlement and discharge of all claims of the United States and of its nationals against Yugoslavia, on account of the nationalization or other taking of property by Yugoslavia which occurred between September 1, 1938 and July 17, 1948. (Settlement of Claims by the Foreign Claims Settlement Commission of the United States and its predecessors

from September 14, 1949 to March 31, 1955, Foreign Claims Settlement Commission of the United States, Washington, D. C., 1955).

The Agreement further provides that this money was to be distributed by the United States among the several claimants (Article 7) and if there was any balance remaining after the adjudication of all claims, that balance was to be returned to Yugoslavia (Article 1(c)). All costs of adjudication were to be charged against the claimants.

It is clear that this money was not paid to the United States as a nation, that this money never became United States money, and that the United States was only to act as trustee for the benefit of all claimants to whom this money belonged. The equitable title to this money was and is in the claimants, subject to being divested in the event they do not prove the validity of their claims.

This contention was emphasized, acknowledged and agreed to by both Houses of Congress throughout the legislative history of the implementing Act. At the request of the Administration, Congressman Ribicoff introduced H. R. 4406, 81st Congress, to provide better machinery than then existed in the Department of State for the handling of claims provided for by the Agreement. In Senate Report 800, 81st Congress, Senator Green, in discussing H. R. 4406, stated (pp. 3-4):

> ". . . This sum has been deposited and covered into the Treasury as a trust fund to be paid out to the respective claimants under the aforesaid agreement. . . .
>
> ". . . The intent of the agreement and the bill is to provide compensation for eligible American property interests nationalized or otherwise taken by the Yugoslav Government. . . .
>
> ". . . Yugoslavia has a reverter interest if the total valid claims are less than the sum of $17,000,000."

On the floor of the Senate, in the very brief discussion of the bill, Senator George, Chairman of the Foreign Relations Committee, stated (96 Cong. Rec. 1797):

> ". . . In the case of Yugoslavia, any money which is not paid to American claimants will, of course, go back to the Yugoslavian Government."

On the House side, Congressman Ribicoff submitted House Report 770, 81st Congress and stated (p. 2):

> ". . . The bill would provide a procedure and a mechanism whereby the money received by the United States in pursuance of the agreement can be apportioned among the claimants. . ."

The House floor debate is replete with references to the fact that this trust fund is the money of the claimants and Yugoslavia, and not that of the United States, and that the United States was only to act as a trustee with respect to this money.

In a colloquy between Mr. Beckworth and Mr. Ribicoff the matter of the title to this money received minute consideration (95 Cong. Rec. 8837):

"Mr. Beckworth: Who has title to this money?

Mr. Ribicoff: The United States holds this money as Trustee, under the settlement of July 18, 1948, between the executive branch of our Government, acting by the Secretary of State, Mr. Marshall, and the Government of Yugoslavia. The $17,000,000 was paid to the United States Treasury in trust for the claimants of the United States. It does not belong to the United States.

Mr. Beckworth: Do you mean the United States Government does not have title to the money?

Mr. Ribicoff: No; it does not have title. It cannot utilize that money for the general purposes of the Nation.

* * * * *

Mr. Ribicoff: We must not forget the character of the funds out of which the individual awards are to be made. It is not a fund owned by this Government. There is no public title to it.... The United States, in effect,

Mr. Ribicoff (continued): holds these funds in escrow. Another way is to say that it is, for the period pending the payment of all awards, trustee for all claimants, including itself, and for Yugoslavia as well, for the residual funds will go back to Yugoslavia. The funds are not a prize over the sharing of which sundry American claimants will contest with each other or against the United States. Residual title to the fund belongs to Yugoslavia. It will get the balance, if there is a balance, after all awards are paid. Essentially the individual claims will still lie against Yugoslavia. This is different from a mixed claims settlement, in this respect only in that Yugoslavia has posted the money in advance and has authorized the United States by its own devices to determine liability in individual cases." (95 Cong. Rec. 8841).

(See also 95 Cong. 8846, 8854, 8855, 8979, 8980).

In the light of the clear intention of the parties to the Agreement and of Congress, the Yugoslav Claims Fund is a trust fund, and the United States is its trustee for the benefit of all claimants. This money belongs to the claimants because their property, which was located in Yugoslavia, was converted into United States currency by the Agreement and paid to the United States Treasury. The United States is only a custodian of this money without any right to attach any conditions as to payment, which would deprive any claimant of his property right in the Fund without due process of law. Appellant is among those claimants whose property in Yugoslavia had been nationalized and converted into United States currency by the Agreement, and therefore has a property right in the Yugoslav Claims Fund.

(b) Where a settlement of claims agreement provides a fund in full discharge of claims of United States nationals, with any balance to be returned to the paying nation, the claimants have a property right in the fund.

The history of the rights of claimants under settlement of claims agreements negotiated by the United States with foreign powers shows that

such agreements fall into three principle categories.

The first category includes those agreements where the United States assumes the obligation of satisfying the claims of its citizens against a foreign power, and require the appropriation of money by Congress. Such appropriations have been construed by the Supreme Court to constitute mere gratuities. In Blagge v. Balch (1896) 162 U.S. 439, the Supreme Court stated:

> ". . . We think that payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payments as of grace, and not of right."

and went on to distinguish claims of this nature from those discussed in the Comegys v. Vasse, infra, and Williams v. Heard, infra:

> "Manifestly the claims involved in these cases do not come within the rule laid down in Comegys v. Vasse and Heard v. Williams, and, without intimating any opinion on their merits, the legislation seems to us plainly to place them within that applied in Emerson's Heirs v. Hall, though the circumstances are not the same /Emerson's Heirs involved donation depending entirely on the generosity of the sovereign/."

Where the United States creates a claim against itself or a right, it need not provide for any remedy through the courts. Stark v. Wickard, 321 U.S. 288. Adhering to that doctrine, this Court recently decided that Congress has power to exclude judicial review with respect to the distribution of money appropriated by Congress. Hijos (Central Rufina) v. Benson (1956) ___ U.S. App. D.C. ___, 231 F. 2d 251.

The Yugoslav Claims Fund established pursuant to the Agreement between the United States and Yugoslavia obviously is not within this category of agreements, since it does not call for any appropriation or creation of any rights by the Congress. Therefore, Congress lacks the power to exclude judicial review as to the determination of property rights recognized by the Agreement.

The second category of agreements provides that the foreign power shall pay a lump sum to the United States for injuries caused to United States nationals, and is paid to the United States as a nation. Money paid over to the United States pursuant to such agreements has been judicially construed by the Supreme Court to be not a mere gratuity but an indemnification of existing property rights in the claimants, and implementing legislation has been held not to create any new rights since the rights have been in the claimants from the time they sustained their losses.

In the early case of Comegys v. Vasse, (1828) 26 U.S. 193, the Supreme Court had under consideration the interpretation to be given to a treaty between the United States and Spain, and the legislation implementing that treaty. Spain acknowledged its illegal seizure of certain vessels belonging to United States citizens, and agreed to pay over to the United States a sum of $5,000,000 to compensate United States citizens for the losses sustained. The money was to be distributed by a United States commission.

The issue before the court was whether such a claim was a property right which passed from a bankrupt's estate to the assignees, or a mere gratuity created by the implementing legislation. Mr. Justice Story held that the claims were property rights which were unenforceable because they were against a sovereign power (p. 216):

> . . . It is not universally, though it may ordinarily be one test of right, that it may be enforced in a court of justice. Claims and debts due from a sovereign are not ordinarily capable of being so enforced. . . . Yet, who will doubt, that such debts are rights? It does not follow, because an unjust sentence is irreversible, that the party has lost all right to justice, or all claim, upon principles of public law, to remuneration. With reference to mere municipal law, he may be without remedy; but with reference to principles of international law, he has a right, both upon the justice of his own and the foreign sovereign. . . .

The Court refused to accept the theory that such indemnifications are mere gratuities and held that such a view was contrary to the intent of the treaty (pp. 216-217):

> . . . The theory, too, that an indemnification for unjust captures is to be deemed, if not a mere donation, as in the nature of a donation, as contrasted with right, is not admissible. It is reasoning against the clear text of the treaty itself. . . . The very ground of the treaty is, that the municipal remedy is inadequate; and that the party has a right to compensation for illegal captures, by an appeal to the justice of the government. It was never understood, that that case was one to which the doctrine of donation applied. The right to compensation in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property in a municipal court of justice. . . . (T)he treaty with Spain. . . recognized an existing right to compensation, in the aggrieved parties; and did not, in the most remote degree, turn upon the notion of a donation or gratuity. . . .

The Supreme Court in this case clearly described the interest of a claimant in his claim as a property right that is unenforceable only because it lies against a sovereign. However, when that sovereign, in concert with the claimant's sovereign, agrees to remove the barrier to the enforcement of the claim, and provides a fund for the purpose of indemnifying the claimant, a claimant's right in his claim thereby becomes a right to be indemnified out of the fund created for that purpose.

Over 60 years later, the Supreme Court in Williams v. Heard (1891) 140 U.S. 529, was again presented with a case very similar to the Comegys case. The issue once again was whether the right to participate in funds paid over to the United States by a foreign sovereign was created by the act of Congress providing the machinery for the distribution of such funds, or existed in the claimants. The principles enunciated in the earlier decision were extensively quoted, and the Court held that the act of Congress established no rights, but merely provided a means to enforce the existing rights of the

claimants to the funds (p. 541):

> . . . They /the claims/ were rights growing out of property; rights it is true, that were not enforceable until after the passage of the act of Congress for the distribution of the fund. But the Act of Congress did not create the rights. They had existed all the time since the losses occurred. They were created by reason of losses having been suffered. All that the Act of Congress did was to provide a remedy for the enforcement of the right.

In this case there was far more reason to support the view that the money was a mere gratuity. Great Britain refused to acknowledge having done any wrong, but agreed to submit the matter to arbitration and pay the United States a lump sum for whatever wrongs had been committed against United States nationals as determined by the arbitrators. However, the Supreme Court denied that the claims were anything like pensions (p. 541):

> "The claims in this case differ very materially from a claim for a disability pension, to which they are sought to be likened. They were descendible; are a part of the estate of the original claimants which, in case of their death, would pass to their personal representatives and be distributable as assets, or might have been devised by will; while a claim for a pension is personal, and not susceptible of passing by a will, or by operation of law, as personalty."

or other gratuities:

> "Neither do we think that the money appropriated by Congress by the Act of 1882 to pay claims should be considered merely as a gratuity."

/ Cf. Mayer, Trustee v. White, Administrator (1860), 24 How. 317; Phelps v. McDonald (1879), 99 U.S. 298.

The Williams case emphasizes that the enactment of legislation which provides machinery to distribute such funds among claimants creates no rights, but merely opens the door for the enforcement of existing rights, rights created by the wrongful acts of a foreign power. Therefore, the Congress, since it creates no rights by such legislation, is without power to attach any

limitations on their enforcement which violate the due process requirements of the Fifth Amendment.

The Yugoslav Claims Fund was not created by an agreement within this category, and does not require implementing legislation to provide machinery for the enforcement of the property rights involved.

The Fund created pursuant to the Agreement is within the third category of agreements. Under these agreements the foreign power pays money into the United States Treasury for the benefit of the claimants, and not to the United States as a nation. Here the United States has no right to the money. Its sole function is that of a trustee and to distribute the fund to the claimants. Anyone having an equitable right in the fund may sue to enforce the payment of the fund or enjoin the payment of his interest in the fund until his rights are judicially determined. Orinoco Co. Ltd. v. Orinoco Iron Co. (1924), 54 App. D. C. 218, 296 Fed. 965.

An examination of the provisions of the Agreement and the legislative history of the implementing act leave no doubt that the Agreement belongs to this last category of agreements.

The foregoing cases demonstrate that a United States citizen who has sustained damages due to the action of a foreign power has a right to be compensated for his loss. This right is a property right which may be assigned, devised, released, etc. If the foreign power pays money to the United States as compensation for this loss, although the United States national has a right to the money, he is barred by the lack of remedy since he has no means by which he may sue his sovereign, the United States. However, once the United States removes this disability, he has a right to enforce his claim against the fund provided. If the

foreign power pays the money to the United States in trust for the benefit of claimants, and the United States accepts that money as trustee, the claimants rights are in the fund itself. There is no bar to its enforcement, and any administrative agency created to distribute the funds is necessarily restricted to verifying the validity and amount of the claims, and distributing the funds.

Where the United States accepts money as trustee, appropriates no money itself, does not bear the cost of administering and distributing the funds, and creates no rights with respect to the funds received, it is inconceivable that it has any power to exclude judicial review of administrative excesses which deprive claimants of their property rights in the funds. Since the Yugoslav Claims Fund was created under these conditions, notwithstanding the restrictions of Section 4(h), the Court has jurisdiction to examine the actions of the Commission which appellant alleges deprived him of his property rights in the Yugoslav Claims Fund.

2. Appellant was deprived of his property right in the Yugoslav Claims Fund by the Commission without due process of law.

(a) The Commission's allowance of full force and effect to a certificate of notation as to the existence of a judgment of a military court rendered in absentia, showing on its face that the court was without jurisdiction over the appellant; deprived appellant of his property right in the Yugoslav Claims Fund without due process of law.

Under Sec. 4(d) of the Act, Congress directed the Commission in examining claims to apply the principles of international law, justice, and equity.

Whenever in the course of litigation in a United States court there arises an issue involving the possible application of the principles of inter-

national law, it is a requirement of United States domestic law that the well-established principles of international law be applied. In Hilton v. Guyot (1895) 159 U.S. 113, the United States Supreme Court stated (p. 163):

> "International law in its widest and most comprehensive sense. . . is part of our law and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination."

A basic principle of international law and of our national law is that a United States court, in which there is an attempt to enforce a judgment rendered by the courts of another country, is not required to grant that judgment full force and effect, but may do so under the doctrine of comity. That doctrine has been defined by the Supreme Court to require the examining court, where the defendant attacks the jurisdiction of the court rendering the judgment or for other irregularities, to be satisfied, as stated in Hilton v. Guyot, supra, (p. 202-203):

> ". . . (W)e are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show to either prejudice in the court, or the system of laws under which it was sitting, or fraud in procuring the judgment or any other special reason why the courts of this nation should not allow it full effect, the merits of the case should not in an action brought in this country upon the judgment, be tried afresh . . . ."

See also Digest of International Law, Hackworth, Vol. II, p. 86, et seq.

The Commission, in its report entitled "Settlement of Claims by The Foreign Claims Settlement Commission of the United States and Its Predecessors from September 14, 1949 to March 31, 1955," acknowledged that these requirements also would have to be met before the Commission would give full faith

and credit to the decrees or judgments issued in Yugoslavia: =

> ". . . (I)t (the Commission) will allow full faith and credit to decrees of Yugoslav courts having appropriate jurisdiction, and in the absence of evidence that the decree was otherwise invalid."

The Commission, in denying appellant's claim, relied on a certificate issued by the Yugoslav Government to the effect that a criminal judgment had been issued by a military court against the appellant in absentia. This action taken by the Commission after the appellant's protests denying both the existence and validity of the alleged judgment, was in complete disregard of the express mandate of Congress, the principles of international law recognized by United States courts, and its own self-imposed admonition. This certificate certainly has no status as an "official record." An official record would have been the original judgment itself, an authenticated exemplification of that judgment, or a sworn copy. None of these documents were produced by the Yugoslav Government or the Commission, and the Commission's decision disallowing the claim was based solely on this bald statement of the Government of Yugoslavia.

An examination of the certificate relied upon by the Commission to deny appellant's claim, discloses that it alleges that a judgment numbered 965/45 was issued by a military court of the Maribor Military District, Maribor, Yugoslavia. Military courts in Yugoslavia are courts of very restricted jurisdiction, limited to military persons. How such a court could obtain jurisdiction in 1945 over the appellant, who was a citizen of Czechoslovakia residing in the United States since 1941, is a mystery which only the Commission could have solved. However, the Commission accepted the certificate

without question, notwithstanding the manifest lack of jurisdiction of the military court.

Not only was this judgment issued by a military court, but it was issued in absentia. Appellant was never notified of any such proceeding being held against him in Yugoslavia, nor did he submit to the jurisdiction of the court. This factor was equally ignored by the Commission in its scrupulous adherence to the Yugoslav certificate.

At the hearing before the Commission, the appellant contested both the existence and the validity of the judgment, pointing out that the Commission did not have the judgment in its possession and that some of the documents sent to the Commission by the Yugoslav Government in his case had been doctored. However, the hearing officer in explaining the Commission's dilemma over these documents felt that the Commission was completely helpless in this matter:

> "We are, however, with respect to official documents, especially court decisions, limited to what the Yugoslav Government will give us. We should have no way to controvert the evidence furnished by the Yugoslav Government unless proper evidence is received in some other way.
>
> There is a possibility, as you suggest, that some of the documents here may have been tampered with and the Commission may not have received true copies. . . .
>
> Whatever the Commission may ultimately decide with respect to this case, I am sure that it will not be in any spirit of hostility. It will be one of not having any better evidence than that furnished by the Yugoslav Government. If a foreign government fails to give us accurate documents, it is greatly to be deplored, but I don't believe the Commission has yet thought of any way to compel them to do so."

The obvious solution, and one which would have been in conformance with the Act; that is, the application of the principles of international law; justice and equity, was not utilized. That this purported judgment should have

been carefully scrutinized by the Commission to make certain that the court issuing it had jurisdiction over the plaintiff, had given plaintiff notice of the hearing and had followed a procedure in accordance with the normal practices which would accord justice to the plaintiff cannot be doubted. Hilton v. Guyot, supra. If the Yugoslav Government did not produce this judgment for careful scrutiny by the Commission, it was not to be deplored, it should have been completely ignored.

Moreover, to add to the confusion concerning this judgment, the certificate read verbatim into the record by the Commission's counsel (Transcript of Hearing, p. 9) is inconsistent with the statement of the Commission concerning this judgment in the proposed decision 1371 (App. D, p. 52a). There the Commission asserted that the alleged judgment was issued pursuant to the Yugoslav Enemy Property Law of November 21, 1944; in the verbatim recitation into the record, no reference was made to any law under which this judgment was issued. This modification of the certificate by the Commission, making the proceedings in Yugoslavia appear to be regular and proper, was not authorized by the Act or any other law.

The Commission also had in its possession a second confiscation decree of a local confiscation commission in Maribor, Yugoslavia, numbered 2494. The Commission failed to examine this document with sufficient care to understand its full import. This decree purported to confiscate as German property, some of the very same property supposedly confiscated by judgment 965/45. This property had been transferred to the German Government in 1941 as Jewish property. However, decision 2494 could only have legal effect if the property was actually the property of Germany; clearly it was not.

Therefore, the decision was nugatory. In fact, the Yugoslav Government re-transferred the property to the original owners on July 27, 1946.

Furthermore, the appellant effectively demonstrated that the document in the Commission's possession which purported to be 2494 had been doctored in such a manner as to change its whole intent. The only suggestion offered by the Commission for the alteration was that of Mr. Harry Stein, counsel for the Commission, who stated: (Transcript of Hearing, p. 14)

> "Mr. Stein: Isn't it equally reasonable, may I ask, to assume it was simply a clerical error of the kind that happens in the best organizations? I am not urging this; I am asking it."

This explanation needs no elaboration.

The doctoring of this decree in addition to its very issuance was certainly enough to serve notice to the Commission that an investigation of the documents submitted by the Yugoslav Government in the plaintiff's case was in order.

It also should be noted that the Commission was not without means to investigate on its own. Its field office in Yugoslavia, the expenses of which were paid out of the Yugoslav Claims fund, could easily have investigated these suspect documents. All that was required was a visit to the Land Record Offices of Maribor, Visegrad and Belgrade. However, the field office was content to merely transmit the Commission's requests to the Yugoslav Government, and await the production of such documents as the Yugoslav Government chose to give it, notwithstanding the obvious fact that it would not produce anything inconsistent with its position and contentions before the Commission. This is particularly true of judgment No. 965/45 which the Yugoslav Government

stated had been lost together with all pertinent files.

Since December 31, 1954, the appellant has obtained many documents relating to his claim which the Yugoslav Government declared missing. These documents completely contradict the findings of the Commission:

1. Judgment 965/45 was not issued pursuant to the Yugoslav Enemy Property Law of November 21, 1954, but pursuant to Uredba O Vojnim Sudovima (Executive Order Concerning Military Courts of May 22, 1944, Sections 13 and 14). The Executive Order in question (a) was issued by the Supreme Commander of the Partisans' Forces. The Partisans were not, as of May 22, 1944, a recognized Yugoslav military force, and therefore, were completely without any legislative power; (b) was never published in any official gazette, and therefore, as a matter of Yugoslav constitutional law, could not have been effective as a law; and (c) only established military courts which had no jurisdiction over civilian persons.

Although the Commission found that "specifically their interest in Mariborska" was confiscated, judgment 965/45 refers to corporations "Mo-Ba (Mariborska)", "Nepokretnost", and "Industrija Drveta", and imposes a confiscation of the corporations' property, even though these corporations were not made defendants, and were not prosecuted. Further, the law under which the appellant was allegedly prosecuted does not provide for the prosecution of corporations or for the confiscation of corporate property.

2. Land Records #156 and #435 of the Maribor Land Record Office which are official documents regarding Mariborska's property, indicate that this property, as previously stated, was retransferred on July 27, 1946, from the name of the German Government to the name of the original owner,

Mariborska Company Limited. It also shows that on September 5, 1946, Mariborska was transferred to the Yugoslav Government pursuant to decision No. 2494. These records clearly establish that the findings of the Commission that Mariborska was confiscated under judgment 965/45 are incorrect.

3. Land Record #360 of the Land Record Office in Visegrad, an actual official record, indicates that "Varda", another of the properties of appellant allegedly taken under judgment 965/45, was actually transferred to the Yugoslav Government on April 5, 1949, pursuant to the Decision of April 2, 1949 of the People's Committee of Visegrad, No. 1886/49, issued on the basis of the Law on Nationalization of April 28, 1948.

4. Decision I-280/46 of the County Court of Belgrade City of April 19, 1947, states that the property of "Nepokretnost" was taken on April 8, 1947 pursuant to judgment 965/45.

Although the Commission held that all of appellant's property was taken by judgment 965/45 on August 18, 1945, the foregoing documents clearly establish that this finding is incorrect, and that the only property taken pursuant to 965/45, and at that in April, 1947, was "Nepokretnost".

The events of this case indeed present a frustrating paradox. The appellant has in his possession the decision of the Commission stating that "it appears from official Yugoslav records that on August 18, 1945 judgment (No. 965/45) was entered. . . the purported effect of which was that all of appellant's property in Yugoslavia. . . was declared confiscated. . .", and also the official records from Yugoslavia declared to the Commission to be lost by the Yugoslav Government, which conclusively contradict the findings of the Commission.

In summary, there was more than sufficient reason present for, and

certainly a duty upon the Commission, to go behind the judgment of the Military Court and other documents to determine their validity before giving the judgment full force and effect. For a tribunal of the United States to accept the decisions of a foreign country without question would be giving greater force and effect to them than is accorded decisions of sister states of the United States.

The decision given full force and effect by the Commission through its blind acceptance of the certificate given to the Commission by the Yugoslav Government in effect allowed the Yugoslav Government to decide plaintiff's case, and was in excess of the authority granted to the Commission and in violation of the intention of Congress. It is manifest that appellant was not deprived of his property right in the Yugoslav Claims Fund by Yugoslavia, but by the actions of the Commission -- reliance on the certificate of notation, failure to scrutinize the certificate or ignore it, and alteration of the certificate itself -- which constituted a denial of due process. Unless the Commission is required to comply with the provisions of the Act as intended by the Congress and to revise Final Decision 1371, plaintiff will be deprived of his property right in the Yugoslav Claims Fund without due process of law in violation of the Fifth Amendment.

(b). The Commission in Interpreting and Applying the Act Exceeded its Authority Thereunder and Deprived Appellant of His Property Rights in the Yugoslav Claims Fund Without Due Process of Law.

The Commission is an administrative agency exercising quasi-judicial powers. It was created by an Act of Congress and derives its entire power, authority and jurisdiction from that Act. (United States v. Ferreira, 13 How.

39, 45 (1851); compare United States v. Weld, 127 U.S. 51 (1888) with Great Western Insurance Co. v. United States, 112 U.S. 193 (1884)). Neither the Commission as such, nor the appellees as members of the Commission, possess any power, authority or jurisdiction over or concerning claims of United States nationals against Yugoslavia other than that provided by the Act. Accordingly, any action which the Commission may take in connection with these claims to be valid must find justification in the provisions of the Act itself. (School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108 (1902); Philadelphia Co. v. Stimson, 223 U.S. 605, 621 (1911)). If the Commission takes action not authorized by the Act, such action is wholly void, of no legal significance or effect, and the courts of the United States may, through the exercise of their general equitable powers, protect persons and property rights from any injury which might otherwise result from such unlawful action. (Work v. Louisiana, 269 U.S. 250 (1925); Stark v. Wickard, 321 U.S. 288 (1943); Board of Governors v. Agnew, 329 U.S. 441 (1946); Utah Fuel Co. v. Coal Comm'n, 306 U.S. 56 (1939); Shields v. Utah Idaho R. Co., 305 U.S. 177 (1938)).

(1) The Commission interpreted the phrase "Nationalization or Other Taking" contrary to the express intention of the Congress.

In interpreting the phrase "nationalization or other taking" as used throughout the Act, the Commission used the terms "nationalization" and "other taking" as terms of equality that could be used interchangeably. Under this interpretation, the Commission allowed any taking of property which the Government of Yugoslavia might assert, whether such taking be illegal or legal, fact or fancy, to take precedence over a taking based upon the legal nationalization of the property by a specific act of Yugoslavia.

The legislative intent of the term "nationalization or other taking" under the Act, clearly indicates that in considering and approving the Act, the Congress was primarily concerned with property taken under several Yugoslav nationalization laws. As stated by the floor manager of the Act, the Hon. Abraham Ribicoff (95 Cong. Rec. 8837):

> "The claims on behalf of American nationals against Yugoslavia grow out of policies and actions of the post-war Communist government of that country. These are principally an agrarian reform law of August 1945; a law of December 6, 1946, nationalization basic industries; a law of May 20, 1948, nationalizing small business enterprises; and a law of June 23, 1948, nationalization virtually all remaining property in Yugoslavia."

A similar statement was submitted in the Senate by Senator Schoeppel (96 Cong. Rec. 1797-1798). When referring to the taking of the property, Mr. Ribicoff discussed it collectively as property which had been nationalized (95 Cong. Rec. 8851):

> ". . . We want it done so that American citizens whose property has been nationalized can come before an American tribunal instead of a foreign tribunal and get their money in dollars instead of a foreign currency. . ."

It was recognized by the Congress, however, that if the Commission were to be restricted in its deliberations to the consideration of only nationalization claims, certain other claims of deprivation of property of United States nationals taken legally or illegally, and properly allowable under the principles of international law, justice and equity, would be excluded. For that reason the Congress included the term "other taking" in describing what claims would be considered by the Commission in an effort to encompass all other deprivations of the property of United States nationals which were not under the nationalization laws.

The Congress made it the duty of the Commission to give as broad an interpretation as possible to the term "other taking", when the taking could not be identified as one by nationalization, to prevent the defeat of claims by the assertion by Yugoslavia that the property was never taken. As stated by Mr. Jack B. Tate, Acting Legal Advisor, Department of State, in response to the following question put to him by Hon. Helen G. Douglas (Hearings before the Committee on Foreign Affairs of the House of Representatives on the International Claims Settlement Act of 1949, 81st Cong., P. 14):

> "Mrs. Douglas, The agreement says 'nationalization or other taking.' What is the difference between 'nationalization' and 'other taking'? Can you explain?
>
> Mr. Tate. I would think nationalization obviously is where the property is nationalized, and 'other taking' is put in there to make sure that the label of nationalization is not requisite if it is a taking of that kind."

The Congress was well-aware that Yugoslavia, although restricted under the Agreement to filing briefs amici curiae, was a party in interest in each proceeding on each claim. The more claims that they could destroy, the greater the likelihood that they would receive some of the $17,000,000 back, since under the Agreement they were entitled to any balance left over after the completion of the examination of all claims. That they almost succeeded is apparent when the statistics surrounding the Commission's proceedings are examined. The Commission considered 1554 claims totaling about $150,000,000, denied 678 claims, and certified 876 awards aggregating $18,817,904.89 (Hearings on Foreign Claims Settlement Commission, H. Comm. on Foreign Affairs, 84th Cong., p. 98). This represents a recovery to the successful claimants of close to 90% before costs of the operation of the Commission. This far exceeded

the expected 42.5% suggested by Rep. Ribicoff in the debates of the Act (95 Cong. Rec. 8838).

From the debates and hearings on the Act, it is manifestly clear that the Congress and the Department of State knew exactly what was intended when the term "other taking" was included in the provisions of the Agreement and then carried over into the Act. It was a catch-all term intended to include all possible types of takings which claimants might assert, in addition to those under the nationalization laws. "Nationalization" is a term readily understood by the Congress to have a particular meaning. If the term had no special meaning, no special significance, why did the Department of State and the Congress use it? It would have been far simpler for the term "any taking" to be used in lieu of the phrase "nationalization or other taking", and let the Commission decide if there was a taking and when the taking took place. In using the term "nationalization or other taking" the Congress intended that the Commission examine the claim to determine if the property were taken pursuant to a nationalization act. If this could not be established, it was then the intention of the Congress that the Commission examine the claim to determine if the property had been taken by Yugoslavia by some other means. It is inconceivable that it ever was the intention of the Congress to permit the Commission to use any taking asserted by the Yugoslav Government as a basis for denying claims founded on legal takings under the nationalization laws.

The appellant's properties were taken under the several nationalization laws. The Government of Yugoslavia claimed that they were not taken under these laws, but had been taken earlier pursuant to a certain military court judgment. The only evidence of the existence of this judgment was the submis-

sion by Yugoslavia of a certificate of a notation in the files of the Military Court in Ljubljana, Yugoslavia that a court proceeding in absentia had been held concerning the appellant and that the appellant had been convicted. Using only this notation, the Commission denied the appellant's claim. This was never the intention of the Congress and the Commission should be required to examine the appellant's claim in accordance with the provisions of the Act as intended by the Congress.

(2) The Commission Acted in an Arbitrary and Capricious Manner.

The United States Supreme Court in discussing the power of the courts to control administrative agencies and their officers so that their actions are kept within the bounds of the authority granted by Congress, stated in Garfield v. Goldsby (1908), 211 U.S. 249, 262:

> ". . . as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

In Stark v. Wickard (1943), 321 U.S. 288, the Court went on to describe the extent of this power in the courts (p. 309):

> "When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justifiable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."

The Commission's action in denying appellant's claim was such an

arbitrary and unjustified denial of appellant's property right in the Yugoslav Claims Fund as to require the aid of the equitable powers of this court to prevent a blatant miscarriage of justice.

In order to aid the court in understanding the capricious nature of the Commission's action, it will be necessary to discuss a claim decided by the Commission in favor of the claimant, Aladar Sege, Docket No. 1467, Decision 1546. In that claim, as in appellant's, claimant Sege was convicted of a criminal charge by a Yugoslav court prior to his becoming a citizen of the United States. Under the alleged court decree, the property of claimant Sege, like the property of appellant, was declared confiscated. Both the property of claimant Sege and appellant were subject to nationalization under the Yugoslav Nationalization Law of December 6, 1946. However, unlike appellant who became a United States citizen prior to said law, claimant Sege became a citizen of the United States after its enactment. Also, unlike appellant, claimant Sege was granted an award for the loss of his property.

The difference in the results reached in two almost identical claims was that the Commission, in deciding appellant's claim, held that appellant's property was taken by Yugoslavia as of the date it was declared confiscated by the military court. However, the Commission held with respect to claimant Sege's claim that his property was not taken until the confiscation decree was carried out by the Yugoslav courts.

Under Yugoslav law, as was stated in the Sege claim, until the confiscation decree is actually carried into effect by a court, property declared confiscated, whether by a military or a civil court, although subject to confiscation, is not actually confiscated. How the Commission reached these

diametrically opposite conclusions in light of the almost identical nature of the two cases has never been clear and certainly cannot be gleaned from the decisions.

To further emphasize the arbitrary nature of the Commission's decisions in deciding these two cases, the Commission completely ignored the admitted fact that claimant Sege's property was subject to nationalization under the Nationalization Law of December 6, 1946 and therefore was taken by Yugoslavia prior to his becoming a United States citizen.

The action of the Commission in denying appellant's claim and refusing to follow its own established precedent as set forth in the Sege Claim was arbitrary and capricious, and deprived appellant of his property right in the Yugoslav Claims Fund without due process of law.

B. The Court Has Power to Declare the Decision of the Commission Null and Void.

As has previously been stated, the Commission is an administrative agency exercising quasi-judicial powers. The appellees, however, argue that because Section 4(h) of the Act provides that the awards of the Commission shall be final and not subject to judicial review, the Commission was empowered to proceed to a determination of the validity and amount of claims in any manner it chose, even in complete and utter disregard of the standards prescribed by Congress in the Act, and the due process requirements of the Fifth Amendment, and that no court of this country can do anything about it! In effect, therefore, appellees contend that they are the recipients from Congress of complete and uncontrolled discretion with respect to the Fund.

Fortunately, such is not the state of the law. The lack of jurisdiction in

the courts to "review" action of administrative agencies or executive officers does not endow them with plenary powers to disregard or infringe upon the property or personal rights of individuals or arbitrarily or capriciously to deprive citizens of their rights under the United States Constitution. It is well established that even in areas in which Congress has lawfully vested in an executive officer the authority to determine conclusively material and relevant questions of fact arising in the administration of laws enacted by Congress, the courts may, through the exercise of their equitable powers, grant relief, where the officer has acted beyond the scope of the authority conferred upon him. Thus, in School of Magnetic Healing v. McAnnulty, supra, the Court stated (p. 107):

> "Conceding for the purpose of this case, that Congress has full and absolute jurisdiction over the mails, and that it may provide who may and who may not use them, and that its action is not subject to review by the courts, and also conceding the conclusive character of the determination by the Postmaster General of any material and relevant questions of fact arising in the administration of the statutes of Congress relating to his department, the question still remains as to the power of the court to grant relief where the Postmaster General has assumed and exercised jurisdiction in a case not covered by the statutes, and where he has ordered the detention of mail matter when the statutes have not granted him power so to order. Has Congress entrusted the administration of these statutes wholly to the discretion of the Postmaster General, and to such an extent that his determination is conclusive upon all questions arising under those statutes, even though the evidence which is adduced before him is wholly uncontradicted, and shows beyond any room for dispute or doubt that the case in any view is beyond the statutes, and not covered or provided for by them?"

And the Court continued (p. 108)"

> "The act of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."

See also Work v. Louisiana, supra; Williams v. Fanning, 332

U. S. 490 (1947); Waite v. Macy, 246 U.S. 606 (1918); Morgan v. United States, 298 U.S. 468 (1918).

So also where Congress has entrusted the determination of questions of law and fact to an administrative agency and the determinations of that agency are final and not subject to "review", the courts nevertheless have power to prevent the agency from disregarding the express provisions of the law which it administers.

In Estep v. The United States, 327 U.S. 114 (1945), the Court stated (p. 122):

> "The provision making the decisions of the local boards 'final', means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

The case of Utah Fuel Co. v. Coal Commission, supra, also demonstrates the weakness of appellees' contentions in the present case. In the Utah Fuel Co. case certain reports had been filed by the plaintiff with the Commission under the National Bituminous Coal Act. Under the Act it appeared that these reports were to be treated as confidential. However, the Commission issued an order, over plaintiff's objections, which would have resulted in the contents of the reports being made public. The plaintiff appealed to the courts seeking review of the order and it was held that the courts were without power to review and the case was dismissed. Thereupon, the plaintiff brought suit in the District Court to enjoin the Commission from carrying out the provisions of the order

and it was held that the courts had jurisdiction to entertain such an action.

See also Shields v. Utah Idaho R. Co., supra; United States v. Jones, 336 U.S. 641 (1949).

From the few cases cited above, it is clear that there exists a definite distinction between the jurisdiction of the courts to "review" the final determinations of an executive officer or an administrative agency and the jurisdiction of the courts to control the actions of executive officers and administrative agencies to see that their actions are confined within the bounds of the authority conferred by statute.

Justice Brandeis most ably noted this distinction when he stated:

> "The administrative bodies in the cases referred to by the court, on the contrary, are in no sense fact-gathering or fact-finding tribunals of first instance. They are tribunals of final resort within the scope of their authority. Their concern is with matters ordinarily outside of judicial competence, -- the deportation of aliens, the enforcement of military discipline, the granting of land patents, and the use of the mails, -- matters which are within the power of Congress to commit to conclusive executive determination. Compare Ex parte Bakelite Corp., 279 U.S. 438, 451. Their procedure may be summary and frequently is. With respect to them, the function of the courts is not one of review but essentially of control -- the function of keeping them within their statutory authority." (Brandeis, J., Dissenting in Crowell v. Benson, 860, 285 U.S. 22, 29 (1932)).

In the case of Rubenstein v. Brownell, 92 U.S. App. D.C. 328, 206 F. 2d 449 (1953), affirmed by an equally divided court, 346 U.S. 929 (1954), which held that the courts have power to enjoin the enforcement by the Attorney General of a deportation order improperly granted, the Court correctly pointed out at the very outset of its opinion that "We are not now reviewing the deportation order." (206 F. 2d 229, 451.)*

* The holding in this case was affirmed by the Supreme Court in Shaughnessy v. Pedreiro (1955) 349 U.S. 48, six members of the court joining in the decision (Minton, Reed and Burton, JJ., dissenting).

Accordingly, Section 4(h) of the Act, under which the action of the Commission in allowing or denying claims is made final and conclusive and not subject to review, is not a proscription upon the jurisdiction of the courts of the United States to control the action of the Commission so that it remains within the lawful bounds of the authority conferred by the terms of the Act. This section is merely a limitation upon the power of the courts to "review" the determinations of law and fact made by the Commission when it acts within the bounds of the authority granted to it.

Moreover, there is nothing whatever, either in the Act itself or in its legislative history, which indicates that Congress intended that the denial of judicial review of the decisions of the Commission was to have the effect of conferring upon the members of the Commission power to disregard the intentions of the parties to the Yugoslav Claims Fund, the mandates of Congress, and constitutional guarantees, and to dispose of the Fund paid to the United States, as trustee, by Yugoslavia in such manner as they might choose. On the contrary, the Act manifests exactly the opposite intention. Far from conferring upon the Commission discretion to determine the manner in which the Fund would be distributed, Congress carefully defined the claims which would be subject to the jurisdiction of the Commission; the laws, treaties, agreements and other factors which were to be applied by the Commission in adjudicating claims; the factual bases upon which claims would be determined; the manner in which the decisions of the Commission would be reached; the content of decisions; the notices of decisions which would be given to claimants; the hearings to which claimants would be entitled; and also provided that except as otherwise specifically provided, the Administrative Procedure Act was to be

complied with by the Commission. Certainly Congress did not intend, by barring judicial review of decisions of the Commission to enable the members of the Commission to disregard some or all of these provisions of the law and thus defeat the existing rights of claimants in the Yugoslav Claims Fund.

It is clear that Congress did not intend under the present law to deprive the courts of the general jurisdiction which they have to require agencies of the government to act within the scope of the authority granted to them by Congress and accordingly this Court has jurisdiction to grant the relief requested in the present case.

Point III. Section 4(h) of the Act is unconstitutional in that it deprives appellant of his property right in the Yugoslav Claims Fund without due process of law.

In enacting legislation to implement the Yugoslav Claims Agreement, Congress included a provision which it was hoped would speed up the determination of claims covered by the Agreement. It was intended by this provision, Sec. 4(h), to withdraw the decisions of the Commission from judicial review.

The speedy determination of the claims is, of course, a worthy goal. However, it is manifest that Congress in enacting this provision did not intend to completely withdraw the Commission's decisions from all judicial scrutiny and permit the Commission, under the protective cloak of this extremely broad provision, to run roughshod over any claimant in its haste to conclude its affairs, and destroy his property right in the Yugoslav Claims Fund by exercising powers in excess of those granted by the Congress. This would leave a claimant at the complete mercy of the Commission.

If this was the intention of the Congress, then this Court must recognize the inherent unconstitutionality of such a provision. As was stated in St. Joseph Stock Yards Co. v. United States (1936) 298 U.S. 38, 51:

> ". . . When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny of determination by a declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained."

The Court then went on to point out that what Congress could not do directly; that is, escape constitutional limitations, it certainly could not do by acting through an agent (p. 52):

> ". . . Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place these rights at the mercy of the administrative officials and seriously to impair the security inherent in our judicial safeguards."

It has been previously shown that appellant has a property right in the Yugoslav Claims Fund (see Point I, supra). That this property right is entitled to protection under the Fifth Amendment to the Constitution is manifest. Therefore, if the Congress in enacting Section 4(h) of the Act intended to absolutely withdraw the decisions of the Commission from all judicial examination, even where constitutional rights were involved, then Section 4(h) of the Act is unconstitutional in that it deprives appellant his property right in the Yugoslav

Claims Fund without due process of law.

Point IV. The Case of de Vegvar v. Gillilland, supra, is not Controlling of the Issues in This Case.

In the de Vegvar case there was no contention that the appellant had any property right in the Yugoslav Claims Fund, and that she was deprived of that right without due process of law. The appellant herein claimed and proved both of these contentions. See Point II, supra.

In the de Vegvar case, there was no claim of any unauthorized acts by the Commission. The judgment there had been rendered by a Yugoslav court pursuant to a law enacted by the Yugoslav legislature. In this case, however, the judgment was rendered pursuant to an Executive Order issued by the Supreme Commander of the Partisans' Forces who was completely without legislative authority. The Commission altered the certificate of notation provided by the Yugoslav Government by adding a citation of a law to it, thus making it appear that the proceedings pursuant to which the alleged judgment was issued were valid. This is not a mere error in reaching a result, but an unauthorized act by the Commission.

In the de Vegvar case, the jurisdiction of the court which rendered the judgment was not attacked, but only the validity of the proceedings before that court. In appellant's case, the very jurisdiction of the court was attacked. The Yugoslav Government, when requested by the Commission to produce the judgment, failed and refused to do so, stating that all of the files pertaining to the proceeding were lost, and only provided its own statement, a certificate of notation, of the existence of the alleged judgment. The certificate on

its face shows that the court which rendered the judgment was without jurisdiction over the appellant because it was a military court and the judgment was rendered in absentia. See Point II, supra.

Finally, in the de Vegvar case the appellant did not directly attack the validity of Section 4(h) of the Act. Here the appellant contends that this section is unconstitutional. See Point III, supra.

CONCLUSION

For the foregoing reasons, we respectfully submit that the order of the District Court dismissing the amended complaint and denying appellant's motion to amend the amended complaint, should be reversed and remanded.

Respectfully submitted,

ACKERMAN & JOVANOVICH

By _____

Paul Ackerman
322 Dupont Circle Building
Washington, D. C.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL DAYTON
300 Central Park West
New York, New York

Plaintiff,

vs.

Civil Action No. 1037-55

WHITNEY H. GILLILLAND, PEARL CARTER PACE, and HENRY J. CLAY, Constituting the Foreign Claims Settlement Commission of the United States, and GEORGE M. HUMPHREY, as Secretary of the Treasury of the United States of America.

Defendants.

AMENDED COMPLAINT FOR INJUNCTION

Comes now PAUL DAYTON by his attorney, Paul Ackerman, and for his complaint alleges:

1. The plaintiff is a citizen of the United States and a resident of the State of New York.

2. The defendants, WHITNEY H. GILLILLAND, PEARL CARTER PACE, and HENRY J. CLAY are members of the Foreign Claims Settlement Commission of the United States (hereinafter referred to as "The Commission") established pursuant to Reorganization Plan No. 1 of 1954 adopted under the Reorganization Act of 1949 as amended (5 USC 133Z et seq.), and are sued in their official capacity as the Foreign Claims Settlement Commission of the United States. Pursuant to said Reorganization Plan all functions of the

International Claims Commission established by the International Claims Settlement Act of 1949, as amended (22 USC 1621 et seq.), were transferred to the Commission.

3. The defendant, GEORGE M. HUMPHREY, is the Secretary of the Treasury of the United States and is sued in his official capacity as such.

4. As hereinafter more fully appears, this action arises under the International Claims Settlement Act of 1949 as amended (22 USC 1621 et seq.) (hereinafter referred to as the "Act"), and under the "Agreement between the Government of the United States of America and Federal Peoples' Republic of Yugoslavia regarding pecuniary claims of the United States and its nationals" filed July 19, 1948 and entered into force July 19, 1948 (hereinafter referred to as the "Yugoslav Claims Agreement").

5. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

6. Pursuant to the provisions of the Act, the Commission was given jurisdiction to receive, examine, adjudicate and render final decisions with respect to claims of nationals of the United States included within the terms of the Yugoslav Claims Agreement.

7. Pursuant to the provisions of the Act and the Rules and regulations of the Commission adopted and promulgated thereunder, plaintiff duly filed with the Commission on or about the 28th day of June, 1951, a claim included within the terms of the Yugoslav Claims Act requesting compensation in the amount of One Million Five Hundred Four Thousand Six Hundred Twenty-four Dollars and Seventy-eight Cents ($1,504,624.78) for the nationalization or other taking by the Government of Yugoslavia of property indirectly owned by the plaintiff through the ownership of the following Corporations which were the direct

owners of such properties: Ta-Ta A.D. Za Proizvednj, 5%; Mariborska Teks Tilna Tvornka Druzba Z.O.Z., 20%; Nepokretnost S.A., 20%; Varda, Industarija Drveta Dionicarsko Društvo, 15%. Simultaneous with the filing of said claim and from time to time thereafter, the plaintiff filed with the Commission and the Commission received numerous documents, declarations, sworn statements and other evidence and written legal contentions in support of such claim. On or about the 15th day of October 1954 the Commission issued a so-called Proposed Decision (Dec. No. 1371) under which plaintiff's claim was denied by the Commission. The said Proposed Decision denied plaintiff's claim on the ground that "the properties involved had been taken over by Yugoslavia prior to the date of naturalization" of the claimant, asserting that the date of the taking of the properties in question was not the date of the nationalization of such properties, but was the date on which certain "other takings" occurred which the Commission admitted may have "been accomplished without legal proceedings of any kind or even without a statutory basis for it in Yugoslav law."

8. The Commission found that "It appears from official Yugoslav records that on August 18, 1945, judgment (No. 965/45) was entered against both claimants (and others) by the Military Court of the Maribor Military District, Maribor, Yugoslavia, in proceedings instituted, in absentia as to the claimants, under the Yugoslav Enemy Property Law of November 21, 1944 (Official Gazette No. 2 of February 6, 1945). . ." The Commission, however, did not produce the judgment on which it relied to deny the claim of the plaintiff, but based its decision on secondary sources of information. An examination of judgment No. 965/45 discloses that it was not issued pursuant to the Yugoslav Enemy Property Law of November 21, 1944, but was issued by the Military

Court under Uredba O. Vojnim Sudovima (Executive Order Concerning Military Courts of May 22, 1944, Sections 13 and 14).

In accepting the secondary source of information and in finding that judgment No. 965/45 was entered in proceedings instituted under the Yugoslav Enemy Property Law of November 21, 1944, the Commission changed the very content of the judgment upon which it relied. In committing this error and failing to examine the judgment in question, the Commission failed to see (1) that the Executive Order under which the decree against the plaintiff was actually rendered was issued by the Supreme Command of the Partisans' Forces, which was not, as of May 24, 1944, a recognized Yugoslav military force, and therefore was without any legislative power; (2) that this Executive Order was never published in any official Gazette, and therefore as a matter of Yugoslav constitutional law could not have been effective; and (3) that the Military courts established by this Executive Order had no jurisdiction over civilian persons, except for crimes committed in Yugoslavia by war criminals against the Yugoslav population, and crimes committed by Yugoslav citizens by aiding enemy forces in Yugoslavia. Under principles of international law judgment No. 965/45 cannot be given force and effect because it is a judgment of a court, if a court at all, without jurisdiction over the plaintiff since the plaintiff had not been in Europe since 1940 and was not a Yugoslav citizen.

9. Thereafter pursuant to the rules and regulations promulgated by the Commission, the plaintiff, through his attorneys, duly filed with the Commission, and the Commission duly received, objections to the denial of the claim, together with an assignment of the errors relied upon, an accompanying brief in support thereof, and a request for a hearing on the claim for the purpose

of taking evidence upon the errors assigned. The Commission thereafter granted the plaintiff's request for a hearing for a hearing for the purpose of taking evidence on the errors assigned, which errors related solely to the issue of the validity of the claim and to the value of the claim. Such hearing was held on the 23rd day of December 1954 before George W. Spangler, an examiner designated by the Commission.

10. During the course of the hearing it was again contended by counsel for the plaintiff that the dates of nationalization were the dates of the actual taking of the property by the Yugoslav Government and not the dates of the "other takings" as alleged by the Yugoslav Government. Further, that the documents relied upon by the Commission as proof of the confiscation of the property of the plaintiff were not exactly the records which were originally on file in Yugoslavia. At the conclusion of the hearing Mr. Spangler again acknowledged the possibility "that some of the documents here (upon which the Commission based its decision denying plaintiff's claim) may have been tampered with and the Commission may not have received true copies."

Notwithstanding the continued agreement by the Commission that its decision was based upon information and belief supplied by the Yugoslav Government, which information and belief the Commission acknowledged may well have been tampered with and false, and that these takings which were alleged by the Yugoslav Government to have occurred before the nationalization of the properties in question may have been illegal, the Commission rendered a Final Decision on or about December 30, 1954, affirming the Proposed Decision of October 15, 1954. The effect of the Commission's action was to hold that Congress under the Act had empowered the Commission to use the terms

"nationalization" and "other taking", as set forth in the phrase "nationalization or other taking", in an alternative sense, thus allowing any taking which the Yugoslav Government might assert, whether such taking be illegal or legal, fact or fancy, to take precedence over a claim based upon the nationalization of the property, and be used as grounds for denying such claim.

11. An examination of the legislative intent with respect to the term "nationalization or other taking" under the Act, clearly indicates that in considering and approving the Act, the Congress was primarily concerned with property taken under the Yugoslav agrarian reform of August 1945, involving the nationalization and distribution of excess farm holdings, the nationalization of basic industries by Yugoslavia under the Act of December 6, 1946, the nationalization of small business enterprises under the Act of May 20, 1948, an amendment to the Act of December 6, 1946, and the nationalization of virtually all remaining property by an Act of June 23, 1948, a further amendment to the Act of December 6, 1946. It was recognized by the Congress, however, that if the Commission were to be restricted in its deliberations to the consideration of only those claims of the taking of properties by nationalization, certain other claims of deprivation of property of United States nationals taken legally or illegally, and properly allowable under the principles of international law, justice and equity, would be excluded. For that reason the Congress included the term "other taking" in describing what claims would be considered by the Commission in an effort to encompass all other deprivations of United States nationals by takings by the Yugoslav Government which were not under the nationalization laws. It was clearly not the intention of the Congress to permit the Commission to use any taking asserted by the Yugoslav Government as a basis for denying

claims founded on legal takings under the nationalization laws, especially where there was doubt as to the legality of such "other takings".

12. Pursuant to the provisions of the Act, George M. Humphrey, Secretary of the Treasury of the United States, is authorized and directed to pay out of the Yugoslav Claims Fund established under the Act to claimants whose awards have been certified to him by the Commission pursuant to Section 5 of the Act, certain sums which are to be computed on the basis of the awards certified to the said defendant by the Commission. On information and belief many awards have been certified by the Commission and the total amount of such awards far exceeds the sums in the said Yugoslav Claims Fund. Therefore, the Yugoslav Claims Fund will be insufficient to pay all awards of the Commission in full and, in accordance with the provisions of the Act, the said defendant will pay all such awards only a pro rata part thereof, which part will be computed on the basis of the total amount of all awards certified to the said defendant by the Commission. Unless the said defendant is enjoined by the Court from paying out of the Yugoslav Claims Fund amounts which would decrease the Fund to an amount less than the full amount of the claim of the plaintiff herein, the Yugoslav Claims Fund may be fully depleted before the plaintiff's claim can be determined by the Commission in accordance with the provisions of the Act as intended by the Congress. In effect, therefore, the rights granted to the claimant under the Act will be completely defeated.

13. Plaintiff has no adequate remedy either at common law or under the statutes. The Act prohibits review by the Courts of the decisions of the Commission and the decision of the Commission on the plaintiff's claim is not, therefore, appealable or reviewable under the statute, and the plaintiff has no

remedy except through the aid of the equity process of this Court.

WHEREFORE, the plaintiff prays:

1. That the Final Decision of the Foreign Claims Settlement Commission in Claim No. Y-1117, Decision No. 1371, be declared to be contrary to the facts and to the law and null and void, and that the said Commission be required to declare the same as ineffective. That the Commission be further required to decide such claim in accordance with the facts and the provisions of the Act as intended by the Congress, and to certify an award made in accordance with such decision to the Secretary of the Treasury of the United States in accordance with the provisions of Section 5 of the Act.

2. That until final disposition of the claim of the plaintiff by the Commission in accordance with the provisions of the Act, the defendant, George M. Humphrey, the Secretary of the Treasury of the United States, be enjoined and restrained from making payments out of the Yugoslav Claims Fund which would reduce the total amount in such Fund to a sum less than $1,504,624.78, in addition to such other sums as may heretofore have been set aside pending the adjudication of other claims for judicial relief.

3. For such other and further relief as to the Court may seem just and proper.

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ANSWER TO AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(SAME TITLE)

First Defense

The Court is without jurisdiction to review the action of the defendants.

Second Defense

The amended complaint fails to state a claim upon which relief can be granted.

Third Defense

Answering specifically the numbered paragraphs of the amended complaint, defendants aver:

1, 2, 3, 4, 5 and 6. Admitted.

7. The allegations contained in paragraph 7 of the amended complaint with the following exceptions:

(a) The allegation that plaintiff's claim was a claim included within the terms of the Yugoslav Claims Act (sic) is a conclusion of law which defendants are not required to answer. In any event, it is denied.

(b) It is denied that the proposed decision stated that the date of the taking of the properties in question was not the "date of Nationalization of such properties".

(c) It is denied that the Commission in its proposed decision admitted or found that the taking of plaintiff's property may have been accomplished without legal proceedings of any kind or even without a statutory basis for it in Yugoslav law.

8. The allegations contained in paragraph 8 of the amended complaint are immaterial. The first sentence thereof is admitted. The remaining allegations thereof are denied.

9. The allegations contained in paragraph 9 of the amended complaint are admitted except it is averred that plaintiff's hearing was held on November 23, 1954 and not on December 23, 1954 as alleged in paragraph 9.

10. The first sentence of paragraph 10 of the amended complaint is immaterial. The second sentence is denied. The third sentence is denied as stated. Defendants aver that the statement of Mr. Spangler was as follows:

"I would like to make a short statement about the case and the hearing.

"First of all, the Commission never takes in any sense an antagonistic position regarding claimants. Both the claimants and the Commission in this case have a difficult problem. Under the agreement with Yugoslavia we have the right and we do request evidence in support of or in refutation of claims. We also have a large staff in Yugoslavia whose job is to examine records, evaluate property. In fact, substantially all properties in the claims before the Commission have been examined by investigation on the spot.

"We are, however, with respect to official documents, especially court decisions, limited to what the Yugoslav Government will give us. We would have no way to controvert the evidence furnished by the Yugoslav Government unless proper evidence is received in some other way.

"There is a possibility, as you suggest, that some of the documents here may have been tampered with and the Commission may not have received true copies. The claimants are always invited to use every resource at their command to get us any evidence they might be able to obtain themselves which would controvert that evidence. It may not even now be too late for the claimants to get additional evidence from Yugoslavia. Many of the claimants before the Commission have attorneys in Yugoslavia and have had them obtain documents even up to the last few days. We get them almost every day. You might consider that possibility.

"Whatever the Commission may ultimately decide with respect to this case, I am sure that it will not be in any spirit of hostility. It will be one of not having any better evidence than that furnished by the Yugoslav Government. If a foreign government fails to give us accurate documents, it is greatly to be deplored, but I don't believe the Commission has yet thought of any way to compel them to do so.

"We have outstanding to our office in Belgrade a very specific request for additional documents in these cases. They, I am sure, will exhaust every effort. Generally our efforts have been very successful, and we have succeeded in obtaining what appear to be reliable documents in substantially all cases. This may be an exception. If that evidence comes in in time for consideration by the Commission, it certainly will be considered. We have not given up either on thiscase, and it is not in the spirit of trying to find a way to disallow it. It is the spirit of trying to find a way to allow it if it can be legally allowed, and a substantial part of it at least turns upon the date of taking which is a legal matter.

"In the event that you do wish to obtain any additional evidence regarding the case, it is, however, most important that you start the wheels today and get the evidence at the earliest possible date. I recommend that you try."

With respect to the fourth sentence of paragraph 10 of the amended complaint, it is admitted that the Commission rendered a final decision on or about December 30, 1954, affirming the proposed decision of October 15, 1954. The remaining allegations of the fourth sentence are denied. The remaining allegations of paragraph 10 are argumentative and require no answer.

11. The allegations contained in paragraph 11 of the amended complaint are argumentative and require no answer.

12. The first three sentences contained in paragraph 12 of the amended complaint are admitted. The fourth sentence contained therein is admitted except defendants deny that plaintiff's claim was not determined in accordance with the provisions of the Act as intended by Congress. The fifth sentence thereof is denied.

13. The first sentence contained in paragraph 13 of the complaint is denied. The second sentence is admitted except defendants deny that the Court may, in the exercise of its general equity powers, review the decision of the Commission.

WHEREFORE, having fully answered defendants demand judgment, together with the costs of this action.

/s/ LEO A. ROVER
LEO A. ROVER
United States Attorney

/s/ OLIVER GASCH
OLIVER GASCH
Assistant United States Attorney

/s/ FRANK H. STRICKLER
FRANK H. STRICKLER
Assistant United States Attorney

/s/ ROBERT L. TOOMEY
ROBERT L. TOOMEY
Assistant United States Attorney

Certificate of Service

I hereby certify that service of the foregoing Answer to Amended Complaint has been made upon plaintiff by mailing a copy thereof to his attorney, Paul Ackerman, Esq., 201-205 Tower Building, Washington, D. C., this 19th day of April, 1955.

/s/ ROBERT L. TOOMEY
ROBERT L. TOOMEY
Assistant United States Attorney

MOTION TO DISMISS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(SAME TITLE)

Come now defendants and by their attorney, the United States Attorney for the District of Columbia, move the Court to dismiss the amended complaint herein upon the ground that the Court lacks jurisdiction of the subject matter of this action.

/s/ Leo A. Rover
LEO A. ROVER
United States Attorney

/s/ Oliver Gasch
OLIVER GASCH
Assistant United States Attorney

/s/ Frank H. Strickler
FRANK H. STRICKLER
Assistant United States Attorney

/s/ Robert L. Toomey
ROBERT L. TOOMEY
Assistant United States Attorney

Certificate of Service

I hereby certify that service of the foregoing Motion to Dismiss together with Points and Authorities in support thereof has been made upon plaintiff by mailing copies thereof to his attorney, Paul Ackerman, Esquire, Suite 605, 2000 P Street, N. W., Washington, D. C., this 5th day of April 1956.

/s/ Robert L. Toomey
ROBERT L. TOOMEY
Assistant United States Attorney

PROPOSED AMENDMENT TO
AMENDED COMPLAINT FOR INJUNCTION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(SAME TITLE)

Comes now PAUL DAYTON by his attorney, PAUL ACKERMAN, and for his complaint alleges:

1. The plaintiff is a citizen of the United States and a resident of the State of New York.

2. The defendants, WHITNEY H. GILLILLAND, PEARL CARTER PACE, and HENRY J. CLAY are members of the Foreign Claims Settlement Commission of the United States (hereinafter referred to as "The Commission") established pursuant to Reorganization Plan No. 1 of 1954 adopted under the Reorganization Act of 1949 as amended (5 USC 133Z et seq.), and are sued in their official capacity as the Foreign Claims Settlement Commission of the United States. Pursuant to said Reorganization Plan all functions of the International Claims Commission established by the International Claims Settlement Act of 1949, as amended (22 USC 1621 et seq.), were transferred to the Commission.

3. The defendant, GEORGE M. HUMPHREY, is the Secretary of the Treasury of the United States and is sued in his official capacity as such.

4. On July 19, 1948, the United States and the Federal Peoples' Republic of Yugoslavia entered into an agreement whereby the Secretary of the Treasury of the United States unblocked certain Yugoslav assets located in the United States, and the Government of Yugoslavia paid into the United States Treasury $17,000,000

of these assets in full settlement and discharge of all claims of the Government of the United States and its nationals against the Government of Yugoslavia on account of the nationalization or other taking by Yugoslavia of property and of rights and interests in and with respect to property which had occurred between September 1, 1938 and July 19, 1948. Thus was created the Yugoslav Claims Fund for the benefit of all United States nationals who had claims against Yugoslavia for the loss of property provided for in the agreement. The figure $17,000,000 was based on what were acknowledged to be outstanding claims against Yugoslavia by United States nationals, such as the plaintiff. If after adjudicating all claims any balance remained, that balance was to be returned to Yugoslavia. All costs of adjudicating the claims was to be charged against claimants.

Plaintiff has been a United States citizen since July 25, 1946. He had property in Yugoslavia which was taken by Yugoslavia pursuant to the Nationalization Law of December 6, 1946, which taking was included within the terms of the agreement. Plaintiff, therefore, has a property right in the Yugoslav Claims Fund.

5. As hereinafter more fully appears, this action arises under the International Claims Settlement Act of 1949 as amended (22 USC 1621 et seq.) (hereinafter referred to as the "Act"), and under the "Agreement between the Government of the United States of America and Federal Peoples' Republic of Yugoslavia regarding pecuniary claims of the United States and its nationals" filed July 19, 1948 and entered into force July 19, 1948 (hereinafter referred to as the "Yugoslav Claims Agreement").

6. The matter in controversy exceeds, exclusive of interest and costs,

the sum of Three Thousand ($3,000.00) Dollars.

7. Pursuant to the provisions of the Act, the Commission was given jurisdiction to receive, examine, adjudicate and render final decisions with respect to claims of nationals of the United States included within the terms of the Yugoslav Claims Agreement.

8. Pursuant to the provisions of the Act and the Rules and Regulations of the Commission adopted and promulgated thereunder, plaintiff duly filed with the Commission on or about the 28th day of June, 1951, a claim included within the terms of the Yugoslav Claims Act requesting compensation in the amount of One Million Five Hundred Four Thousand Six Hundred Twenty-four Dollars and Seventy-eight Cents ($1,504,624.78) for the nationalization or other taking by the Government of Yugoslavia of property indirectly owned by the plaintiff through the ownership of the following Corporations which were the direct owners of such properties: Ta-Ta A.D. Za Proizvednj, 5%; Mariborska Teks Tilna Tvornka Druzba Z.O.Z., 20%; Nepokretnost S.A., 20%; Varda, Industarija Drveta Dionicarsko Drustvo, 15%. Simultaneous with the filing of said claim and from time to time thereafter, the plaintiff filed with the Commission and the Commission received numerous documents, declarations, sworn statements and other evidence and written legal contentions in support of such claim. On or about the 15th day of October, 1954, the Commission issued a so-called Proposed Decision (Dec. No. 1371) under which plaintiff's claim was denied by the Commission. The said Proposed Decision denied plaintiff's claim on the ground that "the properties involved had been taken over by Yugoslavia prior to the date of naturalization" of the claimant, asserting that the date of the taking of the properties in question was not the date of the nationalization of such properties, but was the

date on which certain "other takings" occurred which the Commission admitted may have "been accomplished without legal proceedings of any kind or even without a statutory basis for it in Yugoslav law."

9. The Commission found that "It appears from official Yugoslav records that on August 18, 1945, judgment (No. 965/45) was entered against both claimants (and others)by the Military Court of the Maribor Military District, Maribor, Yugoslavia, in proceedings instituted, in absentia, as to the claimants, under the Yugoslav Enemy Property Law of November 21, 1944 (Official Gazette No. 2 of February 6, 1945). . ." The Commission, however, did not produce the judgment on which it relied to deny the claim of the plaintiff, but based its decision on secondary sources of information. An examination of judgment No. 965/45 discloses that it was not issued pursuant to the Yugoslav Enemy Property Law of November 21, 1944, but was issued by the Military Court under Uredba O Vojnim Sudovima (Executive Order Concerning Military Courts of May 22, 1944, Sections 13 and 14).

In accepting the secondary source of information and in finding that judgment No. 965/45 was entered in proceedings instituted under the Yugoslav Enemy Property Law of November 21, 1944, the Commission changed the very content of the judgment upon which it relied. In committing this error and failing to examine the judgment in question, the Commission failed to see (1) that the Executive Order under which the decree against the plaintiff was actually rendered was issued by the Supreme Command of the Partisans' Forces, which was not, as of May 24, 1944, a recognized Yugoslav military force, and therefore was without any legislative power, (2) that this Executive Order was never published in any official Gazette, and therefore as a matter of Yugoslav

constitutional law could not have been effective; and (3) that the Military courts established by this Executive Order had no jurisdiction over civilian persons, except for crimes committed in Yugoslavia by war criminals against the Yugoslav population, and crimes committed by Yugoslav citizens by aiding enemy forces in Yugoslavia.

Under principles of international law judgment No. 965/45 cannot be given force and effect because it is a judgment of a court, if a court at all, without jurisdiction over the plaintiff since the plaintiff had not been in Europe since 1940 and was not a Yugoslav citizen. The action of the Commission, in relying on the certificate issued by the Yugoslav Government to deny plaintiff's claim, deprived plaintiff of his property right in the Yugoslav Claims Fund without due process of law in violation of the Fifth Amendment to the United States Constitution.

10. Thereafter pursuant to the rules and regulations promulgated by the Commission, the plaintiff, through his attorneys, duly filed with the Commission, and the Commission duly received, objections to the denial of the claim, together with an assignment of the errors relied upon, an accompanying brief in support thereof, and a request for a hearing on the claim for the purpose of taking evidence upon the errors assigned. The Commission thereafter granted the plaintiff's request for a hearing for the purpose of taking evidence on the errors assigned, which errors related solely to the issue of the validity of the claim and to the value of the claim. Such hearing was held on the 23rd day of December 1954 before George W. Spangler, an examiner designated by the Commission.

11. During the course of the hearing it was again contended by counsel

for the plaintiff that the dates of nationalization were the dates of the actual taking of the property by the Yugoslav Government and not the dates of the "other takings" as alleged by the Yugoslav Government. Further, that the documents relied upon by the Commission as proof of the confiscation of the property of the plaintiff were not exactly the records which were originally on file in Yugoslavia. At the conclusion of the hearing Mr. Spangler again acknowledged the possibility "that some of the documents here (upon which the Commission based its decision denying plaintiff's claim) may have been tampered with and the Commission may not have received true copies."

Notwithstanding the continued agreement by the Commission that its decision was based upon information and belief supplied by the Yugoslav Government, which information and belief the Commission acknowledged may well have been tampered with and false, and that these taking which were alleged by the Yugoslav Government to have occurred before the nationalization of the properties in question may have been illegal, the Commission rendered a Final Decision on or about December 30, 1954, affirming the Proposed Decision of October 15, 1954. The effect of the Commission's action was to hold that Congress under the Act had empowered the Commission to use the terms "nationalization" and "other taking", as set forth in the phrase "nationalization or other taking", in an alternative sense, thus allowing any taking which the Yugoslav Government might assert, whether such taking be illegal or legal, fact or fancy, to take precedence over a claim based upon the nationalization of the property, and be used as grounds for denying such claim.

12. An examination of the legislative intent with respect to the term

"nationalization or other taking" under the Act, clearly indicates that in considering and approving the Act, the Congress was primarily concerned with property taken under the Yugoslav agrarian reform of August 1945, involving the nationalization and distribution of excess farm holdings, the nationalization of basic industries by Yugoslavia under the Act of December 6, 1946, the nationalization of small business enterprises under the Act of May 20, 1948, an amendment to the Act of December 6, 1946, and the nationalization of virtually all remaining property by an Act of June 23, 1948, a further amendment to the Act of December 6, 1946. It was recognized by the Congress, however, that if the Commission were to be restricted in its deliberations to the consideration of only those claims of the taking of properties by nationalization, certain other claims of deprivation of property of United States nationals taken legally or illegally, and properly allowable under the principles of international law, justice and equity, would be excluded. For that reason the Congress included the term "other taking" in describing what claims would be considered by the Commission in an effort to encompass all other deprivations of United States nationals by takings by the Yugoslav Government which were not under the nationalization laws. It was clearly not the intention of the Congress to permit the Commission to use any taking asserted by the Yugoslav Government as a basis for denying claims founded on legal takings under the nationalization laws, especially where there was doubt as to the legality of such "other takings".

13. The Commission denied plaintiff's claim on the basis of a military court decree declaring plaintiff's property confiscated. In the case of ALCADAR SEGE, Docket No. Y-1467, Foreign Claims Settlement Decision 1546, the Commission made an award to the claimant on the basis that although the

Yugoslav court decree declared the claimant's property confiscated, the property was not actually confiscated until the confiscation decree was actually carried out. Under Yugoslav law, whether property is declared confiscated by a civil or military court, the confiscation procedure is the same. Therefore, the denial of plaintiff's claim by the Commission was arbitrary and capricious and deprived plaintiff of his property right in the Yugoslav Claims Fund without due process of law in violation of the Fifth Amendment to the Constitution.

14. Section 4(h) of the Act which prohibits review is unconstitutional since the Congress lacks the power to prevent judicial tribunals from scrutinizing the findings of administrative agencies where agency action has resulted in a denial of property rights without due process of law in violation of the Fifth Amendment to the Constitution.

15. Pursuant to the provisions of the Act, George M. Humphrey, Secretary of the Treasury of the United States, is authorized and directed to pay out of the Yugoslav Claims Fund established under the Act to claimants whose awards have been certified to him by the Commission pursuant to Section 5 of the Act, certain sums which are to be computed on the basis of the awards certified to the said defendant by the Commission. On information and belief many awards have been certified by the Commission and the total amount of such awards far exceeds the sums in the said Yugoslav Claims Fund. Therefore, the Yugoslav Claims Fund will be insufficient to pay all awards of the Commission in full and, in accordance with the provisions of the Act, the said defendant will pay all such awards only a pro rata part thereof, which part will be computed on the basis of the total amount of all awards certified to the said

defendant by the Commission. Unless the said defendant is enjoined by the Court from paying out of the Yugoslav Claims Fund amounts which would decrease the Fund to an amount less than the full amount of the claim of the plaintiff herein, the Yugoslav Claims Fund may be fully depleted before the plaintiff's claim can be determined by the Commission in accordance with the provisions of the Act as intended by the Congress. In effect, therefore, the rights granted to the claimant under the Act will be completely defeated.

16. Plaintiff has no adequate remedy either at common law or under the statutes. The Act prohibits review by the Courts of the decisions of the Commission and the decision of the Commission on the plaintiff's claim is not, therefore, appealable or reviewable under the statute, and the plaintiff has no remedy except through the aid of the equity process of this Court.

WHEREFORE, the plaintiff prays:

1. That the Final Decision of the Foreign Claims Settlement Commission in Claim No. Y-1117, Decision No. 1371, be declared to be contrary to the facts and to the law and null and void, and that the said Commission be required to declare the same as ineffective. That the Commission be further required to decide such claim in accordance with the facts and the provisions of the Act as intended by the Congress, and to certify an award made in accordance with such decision to the Secretary of the Treasury of the United States in accordance with the provisions of Section 5 of the Act.

2. That Section 4(h) of the Act be declared unconstitutional.

3. That until final disposition of the claim of the plaintiff by the Commission in accordance with the provisions of the Act, the defendant, George M. Humphrey, the Secretary of the Treasury of the United States, be enjoined and

restrained from making payments out of the Yugoslav Claims Fund which would reduce the total amount in such Fund to a sum less than $1,504,624.78, in addition to such other sums as may heretofore have been set aside pending the adjudication of other claims for judicial relief.

4. For such other and further relief as to the Court may seem just and proper.

ACKERMAN & JOVANOVICH

By _____

Paul Ackerman
Attorney for Plaintiff
322 Dupont Circle Building
Washington, D. C.

ORDER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAME TITLE

This cause came on for hearing on plaintiff's motion for a preliminary injunction, defendants' motion to dismiss, and plaintiff's motion for leave to amend his amended complaint. Upon consideration whereof the Court finds that it does not have jurisdiction of the subject matter of this action. Accordingly, it is by the Court this 4th day of May 1956

ORDERED that the amended complaint be and the same hereby is dismissed, and it is

FURTHER ORDERED that plaintiff's motion for a preliminary injunction be and the same hereby is denied, and it is

FURTHER ORDERED that plaintiff's motion for leave to file an amended complaint be and the same hereby is denied.

/s/ F. DICKINSON LETTS
JUDGE

Certificate of Service

I hereby certify that service of the foregoing Order has been made upon plaintiff by mailing a copy thereof to his attorney, Paul Ackerman, Esq., 322 Dupont Circle Building, Washington, D. C., this 4th day of May 1956.

/s/ Robert L. Toomey
ROBERT L. TOOMEY
Assistant United States Attorney

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAME TITLE

Notice is hereby given that PAUL DAYTON, plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia from the order entered herein dismissing the complaint herein on the ground that the court lacks jurisdiction of the subject matter of the action.

Dated: May 7, 1956

ACKERMAN & JOVANOVICH

By /s/ Paul Ackerman

Paul Ackerman
322 Dupont Circle Building
Washington, D. C.
Attorneys for Plaintiff

ORDER

UNITED ~~STATES COURT~~ OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 13,340 APRIL Term, 1956

Paul Dayton,

Appellant,

v.

Whitney Gillilland, et al., constituting the Foreign Claims Settlement Commission of the United States, et al.,

Appellees

United States Court of Appeals
For the
District of ~~Columbia~~ Circuit

FILED MAY 14 1956

Joseph W. Stewart
Clerk

Before: Prettyman, Wilbur K. Miller and Bastian,
Circuit Judges, in Chambers

This case came on for consideration on appellant's motion for a temporary restraining order and said motion was argued by counsel.

Upon consideration whereof, it is ORDERED by the Court that the aforesaid motion be, and it is hereby, denied.

Per Curiam.

Dated: May 14, 1956

Circuit Judge Wilbur K. Miller dissents.

Wilbur K. Miller, Circuit Judge, dissenting: I agree with the majority that the foregoing order is justified by de Vegvar v. Gillilland, No. 12,791, decided December 22, 1955. I still think that decision, from which I dissented, is clearly wrong and should be overruled. It is, of course, our policy that a recent decision of one panel should not be overruled by another. In order that the full bench may consider whether the de Vegvar case should be overruled, I dissent here, and move that this motion be reheard by the court sitting en banc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAME TITLE

Washington, D. C.

Wednesday, May 2, 1956

Before Judge F. DICKINSON LETTS at 10 a.m. today, on defendants motion to dismiss.

Appearances:

For plaintiff:

Mr. PAUL ACKERMAN

For defendant:

Mr. ROBERT L. TOOMEY

PROCEEDINGS

THE DEPUTY CLERK. No. 4, Dayton versus Gillilland.

THE COURT. Mr. Toomey, I understand you bring this motion.

MR. TOOMEY. That is right, Your Honor.

I understand counsel for the plaintiff wants to make a preliminary comment.

THE COURT. Yes.

MR. ACKERMAN. May it please the Court, I would like to move at this time to amend my pleadings. This amendment will not prejudice the defendants in any way in their rights; it doesn't add or subtract any parties, and it is intended to clarify an issue which we believe requires clarification,

namely, the property right of the plaintiff in this action.

THE COURT. Has Mr. Toomey seen your proposed amendment?

MR. TOOMEY. I haven't seen any proposed amendment, Your Honor. I know wherein he requests leave to amend, or I think I know generally wherein the complaint would be amended. I do oppose it.

I think when we have gotten to this stage and are here ready to argue a motion to dismiss, for the other side to come in at that time and ask to amend its complaint is highly improper, especially in view of the fact that it has already been amended once. 81

In the second place, the amendment, I think, will do no good, in that he wants to amend to -- 107

THE COURT. Mr. Toomey, if you will pardon me.

Mr. TOOMEY. Yes, sir.

THE COURT. Mr. Ackerman, of course in this Court we don't proceed on oral motions. They must be in writing, and it would be necessary for you to accompany your motion by your proposed amendment; and that is not here.

MR. ACKERMAN. I have that in my hand, Your Honor. If Your Honor please, may I hand this up to the bench?

THE COURT. At any rate, the opposing counsel has not had any opportunity to see it.

MR. ACKERMAN. We would be pleased to allow opposing counsel to have an opportunity to see it. But I don't believe this will affect his case in any way, and I don't see really why he should object to it.

MR. TOOMEY. Your Honor, I might make this suggestion. The case is here on motion to dismiss. If our motion is granted, as we feel it would be,

it would then be proper for the plaintiff to seek leave to amend his complaint, in order to state a cause of action or state a claim where a motion to dismiss would not lie. In other words, it should come after the disposition of this motion.

THE COURT. I think that is correct. We could not proceed this morning if I should allow it.

Mr. Toomey, will you please tell me about the case.

* * * *

(Counsel having been heard:)

THE COURT. The Court thinks it is quite clear that the Court lacks jurisdiction of the subject-matter. Accordingly the motion to dismiss will be granted and the motion of plaintiff for preliminary injunction will be denied.

Mr. Toomey will present an appropriate order.

MR. TOOMEY. Yes, Your Honor.

MR. ACKERMAN. May I move at this time, Your Honor, to amend my pleadings?

THE COURT. We could not do that without knowing how you wanted to amend it.

MR. ACKERMAN. To more specifically state the property right involved in this claim.

MR. TOOMEY. Your Honor, I oppose such an amendment, on the ground that since the Court does not have jurisdiction --

THE COURT. That doesn't mean anything to the Court.

MR. ACKERMAN. Your Honor, in the De Vegvar case, as Mr. Toomey has pointed out, it was stated that the issue was a claim, that the

plaintiff had filed a claim with the Commission. In arguing the De Vegvar case the Government pointed out that Mrs. De Vegvar had established no --

THE COURT. But I am telling you that I don't know what your amendment is.

MR. ACKERMAN. I would like to offer it to the Court at this time, Your Honor. I have it here and I have the motion to accompany it.

THE COURT. I haven't seen it.

MR. ACKERMAN. May I? (handing papers to the Deputy Clerk, which were handed up).

THE COURT. What is called "Amendment to amended complaint" may be changed so that it reads "Proposed amendment," and it may be attached to the motion for leave to file amended complaint; and as such, for the sake of the record, it may be included in the file.

MR. ACKERMAN. Thank you.

THE COURT. The motion will be denied, and, Mr. Toomey, you may include that in your order.

MR. TOOMEY. Very well, Your Honor.

THE COURT. Change that so that it reads "Proposed amendment."

REPORTER'S CERTIFICATE

This record is certified by the undersigned reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.

/s/ THOMAS O'NEAL

APPENDIX B

(Public Law 455 - 81st Congress)

(Chapter 54 - 2d Session)

(H.R. 4406)

22 USCA 1621

AN ACT

To provide for the settlement of certain claims of the Government of the United States on its own behalf and on behalf of American nationals against foreign governments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "International Claims Settlement Act of 1949".

Sec. 2. For the purposes of this Act -

(a) The term "person" shall include an individual, partnership, corporation, or the Government of the United States.

(b) The term "United States" when used in a geographical sense shall include the United States, its Territories and insular possessions, and the Canal Zone.

(c) The term "nationals of the United States" includes (1) persons who are citizens of the United States, and (2) persons who, though not citizens of the United States, owe permanent allegiance to the United States. It does not include aliens.

(d) The term "Yugoslav Claims Agreement of 1948" means the agreement between the Governments of the United States of America and of the Federal People's Republic of Yugoslavia regarding pecuniary claims of the United States and its nationals, signed July 19, 1948.

Sec. 9 (a) There is hereby established in the Department of State a commission to be known as the International Claims Commission of the United States (hereinafter referred to as the "Commission") and to be composed of three persons, to be appointed by the President by and with the advice and consent of the Senate. One of such members shall be designated by the President as the Chairman of the Commission and each shall receive compensation at the rate of $15,000 per annum. Two members of the Commission shall constitute a quorum for the transaction of business. Any vacancy that may occur in the membership of the Commission shall be filled in the same manner as in the case of an original appointment; Provided, That in the event of the death, resignation, absence, or disability of a member, the President may designate an acting member from among persons in the judicial or in the executive branch of the Government (including employees of the Commission), who possess the qualifications prescribed by this subsection, to temporarily perform without additional compensation the duties of the member until a successor is appointed or the absence or disability of the member shall cease.

(b) The principal office of the Commission shall be in the District of Columbia. The Secretary of State, in accordance with the provisions of the civil-service laws and the Classification Act of 1923, as amended, upon the recommendation of the Commission, may appoint and fix the compensation of an executive director, and of officers, attorneys, investigators, and other employees.

(c) The Commission may prescribe such rules and regulations as may be necessary to enable it to carry out its functions, and may delegate functions to any member, officer, or employee of the Commission. The President may

fix a termination date for the authority of the Commission, and the terms of office of its members under this Act. Any member of the Commission may be removed by the Secretary of State, upon notice and hearing, for neglect of duty, or malfeasance in office, but for no other cause. Not later than six months after its organization, and every six months thereafter, the Commission shall make a report, through the Secretary of State, to the Congress concerning its operation under this Act. The Commission shall, upon completion of its work, certify in duplicate to the Secretary of State and to the Secretary of the Treasury the following: (1) A list of all claims disallowed, (2) a list of all claims allowed, in whole or in part, together with the amount of each claim and the amount awarded thereon; and (3) a copy of the decision rendered in each case.

Sec. 4 (a) The Commission shall have jurisdiction to receive, examine, adjudicate, and render final decisions with respect to claims of the Government of the United States and of nationals of the United States included within the terms of the Yugoslav Claims Agreement of 1948, or included within the terms of any claims agreement hereafter concluded between the Government of the United States and a foreign government (exclusive of governments against which the United States declared the existence of a state of war during World War II) similarly providing for the settlement and discharge of claims of the Government of the United States and of nationals of the United States against a foreign government, arising out of the nationalization or other taking of property, by the agreement of the Government of the United States to accept from that government a sum in en bloc settlement thereof. In the decisions of claims under this Act, the Commission shall apply the following in the following

order (1) The provisions of the applicable claims agreement as provided in this subsection; and (2) the applicable principles of inter-national law, justice, and equity.

(b) The Commission shall give public notice of the time when, and the limit of time within which, claims may be filed, which notice shall be published in the Federal Register. In addition, the Commission is authorized and directed to mail a similar notice to the last-known address of each person appearing in the records of the Department of State as having indicated an intention of filing a claim with respect to a matter concerning which the Commission has jurisdiction under this Act. All decisions shall be upon such evidence and written legal contentions as may be presented within such period as may be prescribed therefor by the Commission, and upon the results of any independent investigation of cases which the Commission may deem it advisable to make. Each decision by the Commission pursuant to this Act shall be by majority vote, and shall state the reason for such decision, and shall constitute a full and final disposition of the case in which the decision is rendered.

(c) Any member of the Commission, or any employee of the Commission, designated in writing by the Chairman of the Commission, may administer oaths and examine witnesses. Any member of the Commission may require by subpoena the attendance and testimony of witnesses, and the production of all necessary books, papers, documents, records, correspondence, and other evidence, from any place in the United States at any designated place of inquiry or of hearing. The Commission is authorized to contract for the reporting of inquiries or of hearings. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts

of the United States. In case of disobedience to a subpoena, the aid of any district court of the United States, as constituted by chapter 5 of title 28, United States Code (28 U.S.C. 81 and the following), and the United States court of any Territory or other place subject to the jurisdiction of the United States may be invoked in requiring the attendance and testimony of witnesses and the production of such books, papers, documents, records, correspondence, and other evidence. Any such court within the jurisdiction of which the inquiry or hearing is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) The Commission may order testimony to be taken by deposition in any inquiry or hearing pending before it at any stage of such proceeding or hearing. Such depositions may be taken, under such regulations as the Commission may prescribe, before any person designated by the Commission and having power to administer oaths. Any person may be compelled to appear and depose, and to produce books, papers, documents, records, correspondence, and other evidence in the same way as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinabove provided. If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken, provided the laws of the foreign country so permit, by a consular officer, or by an officer or employee of the Commission, or other person commissioned by the Commission, or under letters rogatory issued by the Commission.

Witnesses whose depositions are taken as authorized in this subsection, and the persons taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(e) In addition to the penalties provided in title 18, United States Code, section 1001, any person guilty of any act, as provided therein, with respect to any matter under this Act, shall forfeit all rights under this Act, and, if payment shall have been made or granted, the Commission shall take such action as may be necessary to recover the same.

(f) In connection with any claim decided by the Commission pursuant to this Act in which an award is made, the Commission may, upon the written request of the claimant or any attorney heretofore or hereafter employed by such claimant, determine and apportion the just and reasonable attorney's fees for services rendered with respect to such claim, but the total amount of the fees so determined in any case shall not exceed 10 per centum of the total amount paid pursuant to the award. Written evidence that the claimant and any such attorney have agreed to the amount of the attorney's fees shall be conclusive upon the Commission: Provided, however, That the total amount of the fees so agreed upon does not exceed 10 per centum of the total amount paid pursuant to the award. Any fee so determined shall be entered as a part of such award, and payment thereof shall be made by the Secretary of the Treasury by deducting the amount thereof from the total amount paid pursuant to the award: Any agreement to the contrary shall be unlawful and void. The Commission is authorized and directed to mail to each claimant in proceedings before the Commission notice of the provisions of this subsection. Whoever, in the United States or elsewhere, pays or offers to pay, or promises to pay, or receives on account of services

rendered or to be rendered in connection with any such claim, compensation which, when added to any amount previously paid on account of such services, will exceed the amount of fees so determined by the Commission, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than twelve months, or both, and if any such payment shall have been made or granted, the Commission shall take such action as may be necessary to recover the same, and, in addition thereto, any such person shall forfeit all rights under this Act.

(g) The Attorney General shall assign such officers and employees of the Department of Justice as may be necessary to represent the United States as to any claims of the Government of the United States with respect to which the Commission has jurisdiction under this Act. Any and all payments required to be made by the Secretary of the Treasury under this Act pursuant to any award made by the Commission to the Government of the United States shall be covered into the Treasury to the credit of miscellaneous receipts.

(h) The Commission shall notify all claimants of the approval or denial of their claims, stating the reasons and grounds therefor; and, if approved, shall notify such claimants of the amount for which such claims are approved. Any claimant whose claim is denied, or is approved for less than the full amount of such claim, shall be entitled, under such regulations as the Commission may prescribe, to a hearing before the Commission, or its duly authorized representatives, with respect to such claim. Upon such hearing, the Commission may affirm, modify, or revise its former action with respect to such claim, including a denial or reduction in the amount theretofore allowed with respect to such claim. The action of the Commission in allowing or

denying any claim under this Act shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise.

(i) The Commission may in its discretion enter an award with respect to one or more items deemed to have been clearly established in an individual claim while deferring consideration and action on other items of the same claim.

(j) The Commission shall comply with the provisions of the Administrative Procedure Act of 1946 except as otherwise specifically provided by this Act.

Sec. 5. The Commission shall, as soon as possible, and in the order of the making of such awards, certify to the Secretary of the Treasury and to the Secretary of State copies of the awards made in favor of the Government of the United States or of nationals of the United States under this Act. The Commission shall certify to the Secretary of State, upon his request, copies of the formal submissions of claims filed pursuant to subsection (b) of section 4 of this Act for transmission to the foreign government concerned.

Sec. 6. The Commission shall complete its affairs in connection with settlement of United States-Yugoslav claims arising under the Yugoslav Claims Agreement of 1948 not later than four years following the effective date of this Act: Provided, That nothing in this provision shall be construed to limit the life of the Commission, or its authority to act on future agreements which may be effected under the provisions of this legislation.

Sec. 7. (a) Subject to the limitations hereinafter provided, the Secretary of the Treasury is authorized and directed to pay, as prescribed by section 8 of this Act, an amount not exceeding the principal of each award, plus accrued

interest on such awards as bear interest, certified pursuant to section 5 of this Act, in accordance with the award. Such payments, and applications for such payments, shall be made in accordance with such regulations as the Secretary of the Treasury may prescribe.

(b) There shall be deducted from the amount of each payment made pursuant to subsection (c) of section 8, as reimbursement for the expenses incurred by the United States, an amount equal to 3 per centum of such payment. All amounts so deducted shall be covered into the Treasury to the credit of miscellaneous receipts.

(c) Payments made pursuant to this Act shall be made only to the person or persons on behalf of whom the award is made, except that --

(1) if such person is deceased or is under a legal disability, payment shall be made to his legal representative: Provided, That if the total award is not over $500 and there is no qualified executor or administrator, payment may be made to the person or persons found by the Comptroller General of the United States to be entitled thereto, without the necessity of compliance with the requirements of law with respect to the administration of estates;

(2) in the case of a partnership or corporation, the existence of which has been terminated and on behalf of which an award is made, payment shall be made, except as provided in paragraphs (3) and (4), to the person or persons found by the Comptroller General of the United States to be entitled thereto;

(3) if a receiver or trustee for any such partnership or corporation has been duly appointed by a court of competent

jurisdiction in the United States and has not been discharged prior to the date of payment, payment shall be made to such receiver or trustee in accordance with the order of the court;

(4) if a receiver or trustee for any such partnership or corporation, duly appointed by a court of competent jurisdiction in the United States, makes an assignment of the claim, or any part thereof, with respect to which an award is made, or makes an assignment of such award, or any part thereof, payment shall be made to the assignee, as his interest may appear; and

(5) in the case of any assignment of an award, or any part thereof, which is made in writing and duly acknowledged and filed, after such award is certified to the Secretary of the Treasury, payment may, in the discretion of the Secretary of the Treasury, be made to the assignee, as his interest may appear.

(d) Whenever the Secretary of the Treasury, or the Comptroller General of the United States, as the case may be, shall find that any person is entitled to any such payment, after such payment shall been received by such person, it shall be an absolute bar to recovery by any other person against the United States, its officers, agents, or employees with respect to such payment.

(e) Any person who makes application for any such payment shall be held to have consented to all the provisions of this Act.

(f) Nothing in this Act shall be construed as the assumption of any liability by the United States for the payment or satisfaction, in whole or in part, of any claim on behalf of any national of the United States against any foreign government.

Sec. 8 (a) There are hereby created in the Treasury of the United States (1) a special fund to be known as the Yugoslav Claim Fund, and (2) such other special funds as may, in the discretion of the Secretary of the Treasury, be required, each to be a claims fund to be known by the name of the foreign government which has entered into a settlement agreement with the Government of the United States as described in subsection (a) of section 4 of this Act. There shall be covered into the Treasury to the credit of the proper special fund all funds hereinafter specified. All payments authorized under section 7 of this Act shall be disbursed from the proper fund, as the case may be, and all amounts covered into the Treasury to the credit of the aforesaid funds are hereby permanently appropriated for the making of the payments authorized by section 7 of this Act.

(b) The Secretary of the Treasury is authorized and directed to cover into --

(1) the Yugoslav Claims Fund the sum of $17,000,000 being the amount paid by the Government of the Federal People's Republic of Yugoslavia pursuant to the Yugoslav Claims Agreement of 1948;

(2) a special fund created for that purpose pursuant to subsection (a) of this section any amounts hereafter paid, in United States dollars, by a foreign government which has entered into a claims settlement agreement with the Government of the United States as described in subsection (a) of section 4 of this Act.

(c) The Secretary of the Treasury is authorized and directed out of the sums covered into any of the funds pursuant to subsection (b) of this section, and after making the deduction provided for in section 7 (b) of this Act --

(1) to make payments in full of the principal of awards of $1,000 or less, certified pursuant to section 5 of this Act;

(2) to make payments of $1,000 on the principal of each award of more than $1,000 in principal amount, certified pursuant to section 5 of this Act;

(3) to make additional payments of not to exceed 25 per centum of the unpaid principal of awards in the principal amount of more than $1,000;

(4) after completing the payments prescribed by paragraphs (2) and (3) of this subsection, to make payments, from time to time in ratable proportions, on account of the unpaid principal of all awards in the principal amount of more than $1,000, according to the proportions which the unpaid principal of such awards bear to the total amount in the fund available for distribution at the time such payments are made; and

(5) after payment has been made of the principal amounts of all such awards, to make pro rata payments on account of accrued interest on such awards as bear interest.

(d) The Secretary of the Treasury, upon the concurrence of the Secretary of State, is authorized and directed, out of the sum covered into the Yugoslav Claims Fund pursuant to subsection (b) of this section, after completing the payments of such funds pursuant to subsection (c) of this section, to make payment of the balance of any sum remaining in such fund to the Government of the Federal People's Republic of Yugoslavia to the extent required under article 1 (c) of the Yugoslav Claims Agreement of 1948. The Secretary of State shall

certify to the Secretary of the Treasury the total cost of adjudication, not borne by the claimants, attributable to the Yugoslav Claims Agreement of 1948. Such certification shall be final and conclusive and shall not be subject to review by any other official, or department, agency, or establishment of the United States.

Sec. 9. There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary to enable the Commission to carry out its functions under this Act.

Approved March 10, 1950.

APPENDIX C

AGREEMENT BETWEEN THE GOVERNMENTS OF THE UNITED STATES OF AMERICA AND THE FEDERAL PEOPLE'S REPUBLIC OF YUGOSLAVIA REGARDING PECUNIARY CLAIMS OF THE UNITED STATES AND ITS NATIONALS

The Government of the United States of America and the Government of the Federal People's Republic of Yugoslavia, being desirous of effecting an expeditious and equitable settlement of claims of the United States of America and its nationals against Yugoslavia, have agreed upon the following articles:

Article I

(a) The Government of Yugoslavia agrees to pay, and the Government of the United States agrees to accept, the sum of $17,000,000 United States currency in full settlement and discharge all pecuniary claims of the Government of the United States against the Government of Yugoslavia, other than those arising from Lend-Lease and civilian supplies furnished as military relief, arising between September 1, 1939 and the date hereof, and in full settlement and discharge of all claims of nationals of the United States against the Government of Yugoslavia on account of the nationalization and other taking by Yugoslavia of property and of rights and interests in and with respect to property, which occurred between September 1, 1939 and the date hereof.

(b) Such payment by the Government of Yugoslavia shall be made to the Secretary of State of the United States of America within forty-five days after the signing of this Agreement.

(c) If, upon adjudication made by the agency established or otherwise designated by the Government of the United States to adjudicate claims settled under this Agreement, it is found that the sum of $17,000,000 payable by the Government of Yugoslavia under the provisions of the Agreement is in

excess of the total sum of the claims determined to be valid, exclusive of any interest on such claims for the period beginning on the date of the payment referred to in paragraph (a) of this Article, plus the costs of adjudication, if any, not borne by the claimants, the Government of the United States shall take the necessary steps to return such excess amount to the Government of Yugoslavia.

Article 2

The claims of nationals of the United States to which reference is made in Article 1 of this Agreement include those respecting property, and rights and interests in and with respect to property, which at the time of nationalization or other taking were:

(A) Directly owned by an individual who at such time was a national of the United States.

(B) Directly owned by a juridical person organized under the laws of the United States, or a constituent state or other political entity thereof, twenty percent or more of any class of the outstanding securities of which were at such time owned by individual nationals of the United States, directly, or indirectly through interests in one or more juridical persons of whatever nationality, or otherwise; or

(C) Indirectly owned by an individual within category (A) above, or by a juridical person within category (B) above, through interests, direct, or indirect in one or more juridical persons not within category (B) above, or otherwise.

Article 3

The claims of nationals of the United States to which reference is made in Article 1 of this Agreement do not include claims of individual nationals of the United States who did not possess such nationality at the time of the nationalization or other taking, which claims shall be subject to compensation by the Government of Yugoslavia, either by direct negotiations between that Government and the respective claimants or under compensation procedures prescribed by Yugoslav law.

Article 4

(a) Nothing herein contained shall constitute or be construed to constitute a waiver or release by the Government of Yugoslavia of any claims it or any Yugoslav national may have against any national of the United States.

(b) Claimants against the Government of Yugoslavia for compensation on account of the nationalization or other taking of enterprises, whose claims with respect to such nationalization or other taking are claims which are fully settled and discharged by this Agreement, receiving payment out of the funds to be paid by the Government of Yugoslavia under Article 1 of this Agreement shall be deemed to have undertaken to hold the Government of Yugoslavia, and the respective successor enterprises established by such Government, harmless against, and to have assumed, all debt obligations, including guarantees, of the enterprises of which such claimants were formerly the owners, to nationals of countries other than Yugoslavia, valid and subsisting as of the date hereof, incurred not for the benefit of such enterprises, but for the benefit of the owners thereof; but such assumption and undertaking shall be applicable only to such proportion of such obligations as such claimants'

interests in such enterprises, at the date of the nationalization or other taking thereof, bore to the total ownership interests therein. Debt obligations, including guarantees, owing to nationals of countries other than Yugoslavia, incurred prior to the time such claimants became nationals of the United States, shall be deemed subject to such assumption and undertaking in the absence of proof that such obligations, including guarantees, were incurred for the benefit of such enterprises.

(c) The Government of Yugoslavia recognizes the obligation of the successor enterprises created by it with respect to debts valid under Yugoslav law which were incurred prior to the nationalization or other taking, for the benefit of the enterprises nationalized or otherwise taken. provided, however, that there shall be deemed fully settled and discharged all debt obligations of enterprises, nationalized or otherwise taken, owing to nationals of the United States whose claims against the Government of Yugoslavia with respect to the nationalization or other taking of such enterprises are claims which are fully settled and discharged by this agreement; and further that all debt obligations of such enterprises to juridical persons through which the claims of such claimants are derived shall be deemed settled and discharged in the same proportion as such claimants' interests in such enterprises, at the date of the nationalization or other taking thereof, bore to the total ownership interests therein.

Article 5

The Government of Yugoslavia agrees to accord to nationals of the United States lawfully continuing to hold, or hereafter acquiring assets in Yugoslavia, the rights and privileges of using and administering such assets

and the income therefrom within the framework of the controls and regulations of the Government of Yugoslavia, on conditions not less favorable than the rights and privileges accorded to nationals of Yugoslavia, or of any other country, in accordance with the Convention of Commerce and Navigation between the United States of America and the Prince of Serbia, signed at Belgrade, October 2-14, 1881.[1/]

Article 6

The Government of Yugoslavia agrees not to employ or to permit the employment of trademarks, company names and trade names formerly used in Yugoslavia by enterprises, now nationalized, which were at the time of such nationalization substantially owned, directly or indirectly, by nationals of the United States to the extent that such trademarks, company names and trade names are counterparts of trademarks, company names and trade names used elsewhere than in Yugoslavia by the former American owners of such enterprises, directly or through subsidiaries, or by their authority; provided, however, that nothing herein contained shall prejudice the right of the Government of Yugoslavia, or any national thereof, to employ such trademarks, company names and trade names with the consent of the former owners of such enterprises, or others authorized to permit the use thereof. The Government of Yugoslavia will take such measures as may be necessary and appropriate to prevent the use of such trademarks, company names and trade names within Yugoslavia, except with such consent or in connection with products imported into Yugoslavia with respect to which the use of such trademarks, company names and trade names is permitted by or on behalf of the former owners of

1/ Treaty Series 319; 22 Stat. 963.

such enterprises, or others authorized to permit the use thereof. This Agreement does not affect in any way the rights, if any, of nationals of the United States with respect to trademarks, trade names and company names which were used in Yugoslavia by enterprises which have been taken other than by nationalization.

Article 7

Claims of nationals of the United States for war damage to property which has not been nationalized or otherwise taken prior to the date hereof shall be treated not less favorably than those of nationals of Yugoslavia, but in no event less favorably than those of the nationals of any other country.

Article 8

The funds payable to the Government of the United States under Article 1 of this Agreement shall be distributed to the Government of the United States and among the several claimants, respectively, in accordance with such methods of distribution as may be adopted by the Government of the United States. Any determinations with respect to the validity or amounts of individual claims which may be made by the agency established or otherwise designated by the Government of the United States to adjudicate such claims shall be final and binding.

Article 9

(a) In the interests of an equitable distribution by the Government of the United States among the several claimants for participation in the amount to be paid by the Government of Yugoslavia in full settlement and discharge of claims in accordance with this Agreement, the Government of Yugoslavia will, upon the request of the Government of the United States, and to the extent possible, bearing in mind the wide-spread destruction of property and books and records

in Yugoslavia caused by the war, furnish such information, including certified copies of books, records or other documents, as may be necessary or appropriate to support or refute, in whole or in part, any claim for participation in such amount, and to the same end will permit, in a manner consistent with Yugoslav law, the taking of depositions of such witnesses as may be requested by the Government of the United States.

(b) In the interest of protecting the Government of Yugoslavia from the possible assertion through third countries, or otherwise, of claims falling within the scope of this Agreement, the Government of the United States will supply to the Government of Yugoslavia, certified copies of such formal submissions as may be made by claimants to such agency as may be established or otherwise designated by the Government of the United States to adjudicate claims to participation in the funds to be paid by the Government of Yugoslavia pursuant to this Agreement and of the corresponding awards of such agency with respect thereto. A certified copy of each such submission and award will be supplied to the Government of Yugoslavia within a reasonable time after its receipt or announcement. Subject to such rules and regulations as may be established with respect to proceedings of such agency, the Government of the United States further agrees to make available to the Government of Yugoslavia, upon its request, certified copies of transcripts of any proceedings before such agency and certified copies of documents submitted to such agency in support or in refutation, in whole or in part, of any claim submitted thereto. Subject to such rules and regulations, and with the consent of such agency, the Government of Yugoslavia may file briefs as amicus curiae with respect to any specific claims.

Article 10

(a) The Government of Yugoslavia shall authorize persons residing in Yugoslavia who are legally indebted to any individual, firm, or governmental agency in the United States, to meet such indebtedness on maturity.

(b) To the extent feasible, considering Yugoslav foreign exchange resources and regulations, and when necessary to effectuate the purposes of paragraph (a) of this Article, the Government of Yugoslavia shall permit the use of dollars by, or provide dollars to those Yugoslav residents legally owing dollar obligations arising from commercial transactions involving goods or services.

Article 11

The Government of Yugoslavia agrees to give sympathetic consideration to applications for transfers to the United States of deposits in banks of Yugoslavia and other similar forms of capital owned by nationals of the United States, where the amounts involved are small but which, in view of the circumstances, are of substantial importance to the persons requesting the transfers.

Article 12

The present Agreement shall come into force and effect upon the date of signature.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Agreement.

Done at Washington in duplicate this nineteenth day of July, 1948.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

G. C. MARSHALL
Secretary of State
of the United States of America

FOR THE GOVERNMENT OF THE FEDERAL PEOPLE'S REPUBLIC OF YUGOSLAVIA:

OBREN BLAGOJEVIC
Deputy Minister of Finance
of the Federal People's Republic of Yugoslavia

APPENDIX D

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
Washington, D. C.

In the Matter of the Claims of:	
FRANK THOMAS MAUTNER 607 North Canon Drive Beverly Hills, California	Docket No. Y-877 Decision No. 1370
and	
PAUL DAYTON 300 Central Park West New York, New York	Docket No. Y-1117 Decision No. 1371
Under the Yugoslav Claims Agreement of 1948 and the International Claims Settlement Act of 1949	

Counsel for Claimants:

Reiner & Otens
19 Rector Street
New York 6, New York

PROPOSED DECISION OF THE COMMISSION

Since the essential facts upon which the determination of these two claims is to be made are common to both, they have been consolidated for the purposes of this decision.

Claimant Frank Thomas Mautner, a citizen of the United States since his naturalization on November 8, 1946, asserts a claim for $3,009,257.48 for the asserted value of his interests in 4 corporations whose assets in Yugoslavia were allegedly nationalized or otherwise taken by the Government of Yugoslavia on the various dates hereinafter specified. Claimant Paul Dayton, a citizen of the United States since his naturalization on July 25, 1946, asserts a claim for $1,504,628.74 for the alleged value of his interests in the same properties.

The jurisdiction of this Commission is restricted to the determination of claims for which provision was made in the Agreement of July 19, 1948 between the United States and Yugoslavia. Article 3 of that Agreement limits such claims to those of persons who were nationals of the United States at the time the Government of Yugoslavia took, by nationalization or "other taking," any property owned by them. It is also provided in the Agreement that claims of persons who did not possess such nationality at the time of the taking would be subject to compensation by Yugoslavia, either pursuant to direct negotiations with that Government or under appropriate procedures prescribed by Yugoslav law.

Upon the facts hereinafter discussed, the Commission finds that all of the properties here involved had been taken by Yugoslavia prior to the dates of naturalization of both claimants; and it must, therefore, deny both claims in their entirety. The various properties involved will be discussed separately.

I. Ta-Ta A.D. ZA Prdizvednj, etc. (hereinafter referred to as Ta-Ta).

Claimants assert that this property, a large retail store in Belgrade, was taken by nationalization under Yugoslav Law No. 269 of April 23, 1948 (apparently intended as the Nationalization Law of April 28, 1948, Official Gazette No. 35 of April 29, 1948); and that the values of their respective interests therein at that time were: for Mautner's claimed interest of 10% -- $30,000; and for Dayton's claimed interest of 5% -- $15,000.

Both claimants acknowledge, on information and belief, that, early in 1945, "Ta-Ta was forced to sell the store to Narodni Magazin, a Yugoslav Government and merchandising enterprise." It is asserted that "Ta-Ta was paid the confiscatory price of 1,200,000 dinars for the inventory and fixtures";

but "was paid nothing for its valuable lease, building, good-will, special merchandising concession." Claimants therefore contend that April 23, 1948, rather than 1945, should be regarded as the date of taking of Ta-Ta's interest in the land and building pursuant to the above-mentioned Law No. 269. Ta-Ta's interest in the store building is said to have been a 99-year leasehold. The Yugoslav Government has officially reported to the Commission that "the property of Ta-Ta had been taken over in May 1945 and transferred to the new enterprise Na-Ma."

It is established that all of the property of Ta-Ta was taken by the Government of Yugoslavia early in 1945. That this taking may have been effected through processes which might not be regarded as legal by United States constitutional standards would not alter the fact that Ta-Ta was actually divested of its property in 1945.

That it may have been paid a confiscatory or otherwise inadequate price for some of its assets or the fact, if so, that "it was paid nothing" for certain other of its assets may go to the question whether Ta-Ta has an additional claim of some kind against the Government of Yugoslavia. Any such claim, however, would have arisen in 1945 and thus well before the dates of naturalization of both claimants. This item of the claim must, therefore, be denied.

II. Mariborska Tekstilna Tvornka Druzba Z.O.Z., (Mariborska).

Claimants assert that this enterprise, a weaving and bleaching plant located in Maribor and Varazdin, Yugoslavia, was taken on December 5, 1946 pursuant to The Nationalization of Private Enterprises Act of December 5, 1946 (Official Gazette of December 6, 1946); and that the values of their respective interests in this property at the time of such taking were: for Mautner's

claimed interest of 40% -- $1,301,869.92; and for Dayton's claimed interest of 20% -- $650,934.96.

It appears from official Yugoslav records that on August 18, 1945, judgment (No. 965/45) was entered against both claimants (and others) by the Military Court of the Maribor Military District, Maribor, Yugoslavia, in proceedings instituted, in absentia as to the claimants, under the Yugoslav Enemy Property Law of November 21, 1944 (Official Gazette No. 2 of February 6, 1945), the purported effect of which judgment was that all of the claimant's property in Yugoslavia, including, specifically, their interests in Mariborska, was declared confiscated for the benefit of the Government of Yugoslavia. No appeal appears to have been taken from this decision within the 8-day period prescribed by Yugoslav law. It is also reported by the Yugoslav government that, prior to these proceedings and in May 1945, it had already sequestered and taken over the operation of the Mariborska properties.

It also appears from official Yugoslav government records that other proceedings had also been instituted against the claimants, but solely with respect to the Mariborska properties, under the Yugoslav Confiscation Law of June 9, 1945 (apparently intended as the Yugoslav Confiscation Law of June 12, 1945, Official Gazette No. 40 of June 12, 1945). These proceedings, also apparently instituted in absentia, resulted in a decision of confiscation of the Mariborska properties, by the local Confiscation Commission of Maribor on January 15, 1946. Here again, no appeal appears to have been taken from this decision; and it is reported by the Yugoslav government that this decision was confirmed, pursuant to applicable Yugoslav procedures, on March 1, 1946, when it became final under Yugoslav law.

The claimants indicate, in their Statements of Claim, that they are aware of the substance and purported effect of these proceedings, or at least some of them, but urge the Commission to disregard them on the grounds that they were ex parte, conducted by a "people's court," based on obviously contrived charges, "were clearly a devious attempt by Yugoslavia to take property without legal obligation to compensate" and would, in general, "constitute a denial of justice."

Here again, the Commission must find that the validity or propriety of these proceedings does not control the determination of these claims. Where property has actually been taken by the Government of Yugoslavia under claim of ownership, it would constitute a "taking" within the meaning of the Yugoslav Claims Agreement, even if this had been accomplished without legal proceedings of any kind or even without a statutory basis for it in Yugoslav law. The Yugoslav Claims Agreement expressly contemplated that claims thereunder would be compensated if the property involved had been taken by any means other than nationalization or other legal process assuming, of course, that other conditions precedent, such as nationality have been met.

As was stated in the report (No. 800) of the Senate Committee which approved the International Claims Settlement Act of 1949, "It is known that some property owners were effectively deprived of property rights by Yugoslav authorities without formal nationalization." Both the Agreement and the International Claims Settlement Act contemplated that the effective deprivation of ownership or other property rights by Yugoslav authorities, through any means, would be compensable. The same report also says: "Since the Yugoslav Agreement covers the period of September 1, 1939 to July 19, 1948, the intent was

undoubtedly to encompass all actual deprivations of property." Many legitimate claimants would be deprived of their intended rights under this Agreement if the Commission were to hold that they had no claims for the deprivation of their property unless such deprivation could be regarded as a "legal" one. The Commission cannot, without doing violence to the Agreement and injustice to many claimants, adopt a "floating" test for establishing the date of taking which would vary from case to case, as the peculiar "equities" of each case might incline it.

Such impropriety as may have existed in the procedures by which any such taking was effected or in any judgment of state ownership entered may well be a matter for direct negotiations between the claimant and the Government of Yugoslavia; but it is not a matter for consideration or determination by this Commission.

The Commission finds that the properties were taken on August 18, 1945 by the Military Court decree of that date or approximately a year before the naturalization of either of the claimants. The Commission therefore concludes that the claims for this item also are not covered by the Yugoslav Claims Agreement and are not within its jurisdiction. This item of claim -- for the Mariborska properties -- must, therefore, also be denied.

III Nepokretnost S. A.

Claimants assert that this enterprise, a real estate corporation holding properties in Belgrade, was taken by nationalization under Law No. 269 of April 23, 1948; and that the value of their respective interests therein at that time were: For Mautner's claimed interest of 40% -- $103,200; and for Dayton's claimed interest of 20% -- $51,600.

The Government of Yugoslavia has submitted a certification of its official records indicating that on August 18, 1945, judgment (No. 965/45) was entered against both claimants (and others) by the Military Court of the Maribor Military District, Maribor, Yugoslavia, in proceedings instituted against the claimants and others under the Yugoslav Enemy Property Law of November 21, 1944, effective February 6, 1945, the purported effect of which judgment was that all of the claimants' property in Yugoslavia, including specifically, their interests in Nepokretnost, was declared confiscated for the benefit of the Government of Yugoslavia. No appeal appears to have been taken from this decision within the 8-day period prescribed by Yugoslav law. Presumably, physical possession of this property also was taken by the Government of Yugoslavia before the respective dates of naturalization of both of the claimants.

Such proceedings were the same as those above discussed in reference to the Mariborska properties. The claimants do not appear to have been aware that these proceedings affected, not only their interests in Mariborska, but in the Nepokretnost properties as well. Presumably, the same objections would be raised by the claimants with respect to the effect of these proceedings upon this item of their claims as was urged with respect to the Mariborska property. And, for the reasons already indicated, the Commission is impelled to reach the same adverse conclusion. Accordingly, this item of claim also must be denied.

IV. Varda, Industrija Drvota Dionicarsko Drustvo (Varda)

Claimants assert that this enterprise, a lumber enterprise, was taken on December 5, 1946, pursuant to the Nationalization of Private Enterprises Act of December 5, 1946 (Official Gazette No. 98 of December 6, 1946). They

assert that this property was wholly owned by "Sopinco," a Swiss corporation, and that their interests in the Varda property derive from their ownership of indirect interests, through intermediate corporations, in Sopinco. Claimant Mautner asserts that his interest in Varda was a 30% interest upon which he places a value of $1,574,187.56. Claimant Dayton similarly asserts a 15% interest in Varda for which he claims a value of $787,093.78.

The record is by no means conclusive as to the chain of title through which such interests in Varda are asserted. However, it is unnecessary to resolve any such questions; for it appears that by the above-mentioned Decree of Confiscation of August 18, 1945, the interests of both claimants in Varda were also confiscated. Here, again, actual possession of all Varda assets was apparently taken before the respective dates of naturalization of both claimants. What has been said above with respect to the Nepokretnost and Mariborska properties should suffice in respect of this item of claim; and, for the reasons already indicated, the Commission is impelled to reject this item also.

In any event, it appears from an examination by the Commission's investigators of the physical assets and all available records in Yugoslavia that, at all times which might be pertinent here, Varda's net worth was insufficient to reflect any equity interest in its stockholders.

In their Statements of Claim, the claimants described the assets of Varda as (1) an unspecified quantity of saw mills, forest railroad, locomotives, cars, lumber camps, and other lumbering equipment; (2) exploitation rights in Government forests expiring in 1957; and (3) a 100% interest in Narodna Sumska, a Yugoslav Lumbering corporation.

As to Narodna Sumska, which is valued by the claimants at 42 million dinars, the Commission's investigators were unable to find any records supporting the claim that it was wholly owned by Varda. The claimants themselves have submitted no such proof of ownership. The Yugoslav Government has reported that they have no records supporting such claim. Such evidence as does exist indicates, on the contrary, that Narodna Sumska was not in fact so owned. No issue of Compass (the recognized European financial handbook) for the years 1938 through 1940 gives any indication that Narodna Sumska was owned by Varda; nor does Varda's balance sheet for 1940, attached to the Statements of Claim, reflect any investment which might conceivably represent the ownership of Narodna Sumska; nor does the 1941 issue of Compass indicate, as to the latter corporation, that it had any relationship at all to Varda. It also appears that Narodna Sumska shares were being traded on the Zagreb exchange, in 1937 and 1938, at about 15 dinars per share, thus indicating, not only that Varda could not have been the sole owner of Narodna Sumska at that time but also that the market value of all of its outstanding shares then amounted to no more than 4,350,000 dinars on the open market.

As to the assets of Varda generally, it appears from a physical inspection and from records made available to the Commission's investigators by the Yugoslav Government, first, that Varda suffered great war damage (estimated by the claimants at 76,400,000 dinars) for which, as the Commission has previously ruled, no compensation may be provided; that during the years 1937 to 1939, Varda's earnings averaged approximately 120,000 dinars and that in 1940 it operated at a loss of 606,000 dinars; and that its total assets at the time of taking could not have been in excess of 21,900,000 dinars against which there

existed, as of November 30, 1945, total liabilities of 48,858,431 dinars, of which 24,300,000 was owed to Mariborska and considered an asset of the latter company.

The exploitation rights referred to would have expired in 1957; and, in the light of Varda's most recent record of operating experience, its prospective earnings from such rights would apparently be too speculative to permit attributing to them substantial value.

For the foregoing reasons, these claims, in all respects, are denied.

Dated at Washington, D. C.

Oct. 15, 1954

I hereby certify that the within is a true and correct copy of the original Proposed Decision on file with the Commission.

Deputy Clerk of the Commission

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
Washington, D. C.

In the Matter of the Claim of:	
PAUL DAYTON 300 Central Park West New York, New York	Docket No. Y-1117
Under the Yugoslav Claims Agreement of 1948 and the International Claims Settlement Act of 1949	Decision No. 1371

Counsel for Claimant:

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FINAL DECISION OF THE COMMISSION

On October 15, 1954, the Commission issued a consolidated Proposed Decision on the above-entitled claim and the claim of Frank Thomas Mautner (Docket No. Y-877), which decision, for the reasons therein stated, denied both claims in their entirety.

Thereafter, pursuant to applicable Commission procedures, objections to such Proposed Decision and a supporting brief were filed, and a hearing requested thereon. The objections filed on behalf of both such claimants were identical and a consolidated hearing was held. Both claimants appeared at the hearing and were represented by the same counsel who made argument in support of the objections. Oral testimony was also taken and additional evidentiary material was then introduced. Thereafter, pursuant to leave granted at the hearing, further documentary material was submitted to the Commission.

The objections urged by the claimant were directed primarily to the authenticity of certain certifications and copies of decrees and other reports and data submitted to the Commission by the Government of Yugoslavia in its various communications to the Commission in connection with the determination of this claim. Such material related to the dates of the taking by the Government of Yugoslavia of the major assets involved in this claim which takings the Commission had found to have occurred prior to the date of naturalization of the claimant.

Upon consideration of the entire record now before it, and of the oral argument and brief filed by counsel for the claimant, the Commission is of the opinion that sufficient basis does not exist for a finding that such documents so submitted to the Commission were not authentic or for modifying, in any other respect, its Proposed Decision herein; and the Commission has therefore concluded that its Proposed Decision should be and it is hereby adopted as its Final Decision on this claim.

Dated at Washington, D. C.

Dec 30 1954

I hereby certify that the within is a true and correct copy of the original Final Decision on file with the Commission.

/s/ A. C. Coates
Deputy Clerk of the Commission